IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

THE STATE OF WISCONSIN,

vs.

ETHAN ALLEN HITCHCOCK, Secretary of the Interior.

In Equity.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States sitting in Equity.

Now comes the State of Wisconsin, by its Attorney General, L. M. Sturdevant, and T. W. Spence, special counsel, and moves the court that the State of Wisconsin be permitted to file its bill of complaint in equity against Ethan Allen Hitchcock, Secretary of the Interior of the United States, but a citizen and resident of the State of Missouri, as a cause of which this court has original jurisdiction under Section 2 of Article 3 of the Constitution of the United States and under an Act of Congress of the United States passed March 2, 1901, and that upon filing thereof a subpoena shall issue as provided by Rule 12 of the Rules of Practice in Equity.

The State of Wisconsin, by

L. M. STURDEVANT,
Attorney General.

T. W. SPENCE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

THE STATE OF WISCONSIN,

v.

ETHAN ALLEN HITCHCOCK, Secretary of the Interior.

In Equity.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States sitting in Equity.

The State of Wisconsin, by its Attorney General, L. M. Sturdevant, and T. W. Spence, special counsel, by leave of court first had and obtained, files this, its bill of complaint, against Ethan Allen Hitchcock, who is Secretary of the Interior of the United States, and who is a citizen of the State of Missouri.

And whereupon your orator complains and says:

I.

That in and by Section 7 of an Act of Congress of the United States to ENABLE THE PEOPLE OF WISCONSIN TERRITORY TO FORM A CONSTITUTION AND STATE GOVERNMENT AND FOR THE ADMISSION OF SUCH STATE INTO THE UNION, approved August 6, 1840, it was enacted as follows:

"Section 7. And be it further enacted that the following propositions are hereby submitted to the convention which

shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States.

1. That Section numbered 16 in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said state for the use of schools."

That on February 1, 1848, the constitutional convention of the people of said territory, duly called in accordance with said enabling act of congress, adopted a constitution which was thereafter duly ratified by vote of the people of said territory on the 2d day of March, 1848, in accordance with the provisions of the enabling act aforesaid and the provisions of said constitution.

That in and by Section 2 of Article 2 of said constitution all of the propositions of the enabling act of congress aforesaid were accepted, ratified and confirmed, including the provisions of Section 7 thereof hereinbefore set forth.

II.

That following the adoption of said constitution by an act of congress of the United States, approved May 29, 1848, said State of Wisconsin was duly admitted into the Union on equal footing with the original states in all respects whatsoever, with the following boundaries, to-wit: Beginning at the northeast corner of the State of Illinois, that is to say, at a point in the center of Lake Michigan, where the line of forty-two degrees and thirty minutes of north latitude crosses the same; thence running with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the channel of said river to the Brule River; thence up said last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South Islands,

in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the Saint Louis River; thence up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the river Saint Croix; thence down the main channel of the said river to the Mississippi; thence down the center of the main channel of that river to the northwest corner of the State of Illinois; thence due east with the northern boundary of the State of Illinois to the place of beginning.

III.

That by virtue of the enabling act aforesaid and the acceptance of its provisions in the constitution of the State of Wisconsin and the admission of said state into the Union, said State of Wisconsin acquired the fee in Section 16 in all the lands belonging to the United States at the time of the admission of said state into the Union and theretofore surveyed, and the right to the fee in Sections 16 in all lands so owned by the United States whenever and as soon as the same should be surveyed.

IV.

That prior to the 28th day of March, 1843, almost the entire northern half of the state, including the lands lying between Lake Superior on the north, Green Bay and Fox River on the east, the latitude of Plover Portage on the Wisconsin River on the south and the Mississippi River on the west, was unceded Indian land occupied in the main by various branches of the tribe of Chippewa Indians and in a lesser part by the tribes of Menomonees and Winnebagoes.

V.

That on the 28th day of March, 1843, a treaty was made and concluded at La Pointe, on Lake Superior, in the then territory of Wisconsin, between the said Chippewa Indians and Robert Stuart, commissioner on the part of the United States, a copy of which is as follows:

"Article 1. The Chippewa Indians of the Mississippi and Lake Superior **cede to the United States** all the country within the following boundaries, viz.: Beginning at the mouth of Chocolate River of Lake Superior; thence northwardly across said lake to intersect the boundary line between the United States and the Province of Canada; thence up said Lake Superior to the mouth of the St. Louis or Fond du Lac River, (including all the islands in said lake); thence up said river to the American Fur Company's trading-post, at the southwardly bend thereof, about twenty-two miles from its mouth; thence south to intersect the line of the treaty of 29th of July, 1837, with the Chippewas of the Mississippi; thence along said line to its southeastwardly extremity, near the Plover Portage on the Wisconsin River; thence northeastwardly, along the boundary line, between the Chippewas and Menomonees, to its eastern termination, (established by the treaty held with the Chippewas, Menomonees and Winnebagoes; at Butte des Morts, August 11, 1827), on the Skonawby River of Green Bay; thence northwardly to the source of the Chocolate River; thence down said river to its mouth, the place of beginning; it being the intention of the parties to this treaty to include in this cession all the Chippewa lands eastwardly of the aforesaid line running from the American Fur Company's trading-post, on the Fond du Lac River, to the interesection of the line of the treaty made with the Chippewas of the Mississippi, July 29th, 1837.

Article 2. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privilege of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in

force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

Article 3. It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands shall be the common property and home of all the Indian party to this treaty.

Article 4. In consideration of the foregoing cession, the United States engage to pay to the Chippewa Indians of the Mississippi and Lake Superior, annually, for twenty-five years, twelve thousand five hundred (12,500) dollars in specie, ten thousand five hundred (10,500) dollars in goods, two thousand (2,000) dollars in provisions and tobacco, two thousand (2,000) dollars for the support of two blacksmiths' shops, (including pay of smiths and assistants, and iron, steel, etc.,) one thousand (1,000) dollars for the pay of two farmers, twelve hundred (1,200) dollars for pay of two carpenters, and two thousand (2,000) dollars for the support of schools for the Indians party to this treaty; and further the United States engage to pay the sum of five thousand (5,000) dollars as an agriculture fund, to be expended under the direction of the Secretary of War. And also the sum of seventy-five thousand (75,000) dollars shall be allowed for the full satisfaction of their debts within the ceded district, which shall be examined by the commissioner to this treaty, and the amount to be allowed decided by him, which shall appear in a schedule hereunto annexed. The United States shall pay the amount so allowed within three years.

Whereas, the Indians haxe expressed a strong desire to have some provision made for their half-breed relatives, therefore it is agreed that fifteen thousand (15,000) dollars shall be paid to said Indians, next year, as a present, to be disposed of as they together with their agent, shall determine in council.

Article 5. Whereas the whole country between Lake Superior and the Mississippi has always been understood as belonging in common to the Chippewas, party to this treaty; and

whereas the bands bordering on Lake Superior have not been allowed to participate in the annuity payments of the treaty made with the Chippewas of the Mississippi, at St. Peters, July 29, 1837, and whereas all the unceded lands belonging to the aforesaid Indians are hereafter to be held in common, therefore, to remove all occasions for jealousy and discontent, it is agreed that all the annuity due by said treaty as also the annuity due by the present treaty, shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share.

Article 6. The Indians residing on the Mineral district shall be subject to removal therefrom at the pleasure of the President of the United States.

Article 7. This treaty shall be obligatory upon the contracting parties when ratified by the President and Senate of the United States.

Proclaimed March 28, 1843."

VI.

That in compliance with Article 4 of said treaty, the United States paid the consideration for said lands so ceded, in strict accordance with the stipulations therein contained, to-wit: An aggregate sum of money and merchandise amounting to eight hundred and sixty thousand dollars, and all the title of said Indians in and to said lands was thereupon and thereby extinguished except a mere temporary right of occupancy.

VII.

That by the terms of the treaty aforesaid the said Chippewa Indians released to the United States prior to the passage of the enabling act of congress aforesaid and to the adoption of the constitution of the State of Wisconsin and the acceptance of the school land grant therein contained by said state, all of their claims to said lands and each and every part thereof, and

ceded the same to the United States; and the State of Wisconsin became vested with an absolute right in and to all the sections Sixteen, within said territory, subsequently surveyed by the United States, with the right in said State as against the United States, to have the temporary possession or occupancy of the Indians aforesaid terminated by the United States.

VIII.

That all of townships 46, 47 and 48, of ranges 1, 2, 3 and 4 west, within the State of Wisconsin, as they now exist, and as they have existed since the admission of Wisconsin into the United States, lie within and are a part of the territory ceded by said Chippewa Indians by and under said treaty of 1843.

IX.

That on and prior to the 29th day of January, 1855, the township lines of said townships 46, 47 and 48, ranges 1, 2, 3 and 4 west, had been duly surveyed by the United States into townships, although the particular sections within said townships and ranges had not been run. That thereby the said townships had been definitely located and surveyed within the meaning of said enabling act and the acceptance thereof and within the rules and regulations of the Land Department of the United States in such case made and provided, and that the same had thereby become definitely known and recognized as public lands and the right to the fee thereof in sections 16 of the several townships and ranges aforesaid definitely secured to the State of Wisconsin under the Enabling Act and Acts of Congress and Indian treaty aforesaid.

X.

That on or about the 30th day of September, 1854, a treaty was made and concluded by Henry C. Gilbert and David B. Harriman, commissioners, on the part of the United States, and

the Chippewa Indians of Lake Superior and Mississippi, which treaty was proclaimed January 29, 1855, and of which the following is a copy:

FRANKLIN PIERCE, President of the United States of America, to all and singular to whom these presents shall come, greeting:

WHEREAS, a treaty was made and concluded at LaPointe, in the State of Wisconsin, on the thirtieth day of September, eighteen hundred and fifty-four, by Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men, which treaty is in the words following, to-wit:

Articles of a treaty made and concluded at LaPointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men.

Article 1. The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary line, to-wit: Beginning at a point where the east branch of Snake River crosses the southern boundary-line of the Chippewa Country, running thence up the said branch to its source, thence nearly north, in a straight line, to the mouth of East Savannah River, thence up the St. Louis River to the mouth of East Swan River, thence up the East Swan River to its source, thence in a straight line to the most westerly bend of Vermillion River, and thence down the Vermillion River to its mouth.

The Chippewas of the Mississippi hereby consent and agree to the foregoing cession, and consent that the whole amount of the consideration money for the country ceded above shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi all their interest in and claims

to the lands heretofore owned by them in common, lying west of the above boundary line.

Article 2. The United States agrees to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz.:

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan: Township fifty-one north, range thirty-three west; township fifty-one north, range thirty-two west; the east half of township fifty north, range thirty-three west; the west half of township fifty north, range thirty-two west; and all of township fifty-one north, range thirty-one west, lying west of Huron Bay.

2d. For the LaPointe Band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the center of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground.

3d. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

4th. For the Fond du Lac bands, a tract of land bounded as follows: Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary line heretofore described, thence north along said boundary line to the mouth of the Savannah River, thence down the St. Louis River to the

place of beginning. And if said tract shall contain less than one hundred thousand acres, a strip of land shall be added on the south side thereof large enough to equal such deficiency.

5th. For the Grand Portage Band, a tract of land bounded as follows: Beginning at a rock a little east of the eastern extremity of Grand Portage Bay, running thence along the lake shore to the mouth of a small stream called by the Indians Maw-ske-gwaw-caw-maw-se-be, or Cranberry Marsh River, thence up said stream, across the point to Pigeon River, thence down Pigeon River to a point opposite the starting point, and thence across to the place of beginning.

6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

7th. Each head of a family, or a single person over twenty-one years of age at the present time, of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

Article 3. The United States will define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion,

make rules and regulations respecting the disposition of the bands in case of the death of the head of a family or a single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Article 4. In consideration of and payment for the country hereby ceded, the United States agrees to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to-wit: Five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in agricultural implements and cattle, carpenter's and other tools, and building materials, and three thousand dollars for moral and educational purposes, of which last sum three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also, the further sum of six thousand dollars in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready made clothing, to be distributed among the young men of the nation at the next annuity payment.

Article 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much longer as the President may think proper, at each of the points herein set

apart for the residence of the Indians, the same to be in lieu of all the employes to which the Chippewas of Lake Superior may be entitled under previous existing treaties.

Article 6. The annuities of the Indians shall not be taken to pay the debts of individuals, but satisfaction for the depredations committed by them shall be made by them in such manner as the President may direct.

Article 7. No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the residence of the Indians, and the sale of the same shall be prohibited on the territory hereby ceded, until otherwise ordered by the President.

Article 8. It is agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from former treaties existing prior to the year 1847.

Article 9. The United States agree that an examination shall be made and all sums that may be found equitably due to the Indians, for arrearages of annuity or other thing, under the provisions of former treaties, shall be paid as the chiefs may direct.

Article 10. All missionaries, and teachers, and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed to the amount of one-quarter section each.

Article 11. All annuity payments to the Chippewas of Lake Superior shall hereafter be made at L'Anse, LaPointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded shall have the right to hunt and fish therein, until otherwise ordered by the President.

Article 12. In consideration of the poverty of the Bois Forte Indians, who are parties to this treaty, they having never re-

ceived any annuity payments, and of the great extent of that part of the ceded country owned exclusively by them, the following additional stipulations are made for their benef[illegible] The United States will pay the sum of ten thousand dollars, as their chiefs in open council may direct, to enable them to meet their present just engagements. Also, the further sum of one thousand dollars, in five equal annual payments in blankets, cloth, nets, guns, ammunition and such other articles of necessity as they may require.

They shall have the right to select their reservation at any time hereafter under the direction of the President; and the same may be equal in extent, in proportion to their numbers, to those allowed the other bands, and be subject to the same provisions.

They shall be allowed a blacksmith, and the usual smith-shop supplies, and also two persons to instruct them in farming, whenever in the opinion of the President it shall be proper, and for such length of time as he shall direct.

It is understood that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as the Chippewas of Lake Superior; **Provided,** That the stipulation by which the Chippewas of Lake Superior relinquishing their right to land west of the boundary-line shall not apply to the Bois Forte band, who are parties to this treaty.

Article 13. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

Proclaimed January 29, 1855.

XI.

That in and by the terms of said treaty the said Chippewa Indians ceded to the United States the lands described in Article 1 of said treaty, lying within the boundaries of the present state of Minnesota, and not including therein any of the land embraced in the treaty of March 28, 1843, hereinbefore set forth.

XII.

That by Subdivisions 2 and 3 of Article 2 of said treaty the United States agreed to set apart and withhold from sale for the use of certain bands of the Chippewas of Lake Superior, the lands described in or provided for in such subdivision. That all of the lands which the United States thereby agreed to so set apart for the La Pointe band and such other Indians as might see fit to settle with them and for the other Wisconsin bands, included and embraced lands covered by said treaty of 1843, and lands in which the State of Wisconsin had under the enabling act and its state constitution, and the treaty with said Indians of 1843, become entitled to every sixteenth section to be thereafter surveyed therein.

XIII.

That in and by the terms of Article 3 of the foregoing treaty of 1854, the power was expressly reserved to the United States to make changes in the boundaries of the tracts so reserved for said several bands of Indians, or otherwise as might be necessary to prevent interference with any vested rights.

XIV.

That under the enabling act of congress aforesaid and its state constitution, and under and in view of the cession of the Chippewa Indians contained in said treaty of 1843, the right to all of the lands surveyed and to be surveyed as section 16 of the various townships in the territory covered by said treaty, vested in the State of Wisconsin, and has ever since the admission of said state into the Union, been claimed by it.

XV.

That of the lands provided by Subdivision 2 of Article 2 of said treaty of 1855, to be set apart by the United States for the La Pointe band and others of said Chippewa Indians, the township line of township 47, range 1 west, had been surveyed by the United States in the year 1847, and the township lines of all of the other townships mentioned in said subdivision were surveyed by the United States in the months of June and July, 1852. That thereafter, beginning in the year 1855, and extending to the months of June and July, 1873, the various townships mentioned in said subdivisions were surveyed and re-surveyed into sectional subdivisions, and thereafter, up to the filing of said bill, the lines of said reservation have been drawn and outlined so as to include all of townships 46 and 47 north, ranges 2 and 3 west, sections 4 to 9 inclusive, and sections 16 to 18 inclusive, in township 47 north, of range 1 west, sections 17 to 21 and 27 to 36 inclusive, in township 48 north, of range 2 west, all of section 48, range 3 west, lying south and east of Lake Superior, and sections 24 and 25 and 36 of township 48 north, of range 4 west, in accordance with the existing United States surveys.

That a plat of said lands reserved or provided to be reserved, under said treaty of 1854 to said La Pointe band of Indians is hereto annexed and made a part of this bill.

XVI.

That said State of Wisconsin has at all times heretofore since its admission to the Union, claimed a right to the fee of all lands in sections 16 in the several townships within said reservation, and since the sectional survey thereof by the United States has claimed the actual fee in said sections, and has exercised dominion and ownership over the same, and has issued

sundry and divers patents to divers persons and corporations to portions thereof, sundry of which persons and corporations, grantees of the state as aforesaid, have also exercised acts of ownership, and have paid the taxes and made improvements thereon, and have cut and hauled timber therefrom until forbidden by orders of the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, as hereinafter more particularly mentioned.

XVII.

That under the treaty of 1854 aforesaid, and in carrying out its provisions, the said Secretary of the Interior has proceeded, through the United States Indian Department, to allot from time to time, to the various members of said tribe of La Pointe band of Indians, eighty acres per capita of lands within said reservation, and has caused patents therefor to be issued to the members of said tribe as individuals, and such members as have become full citizens of the United States and have terminated their tribal relations and have ceased to occupy said reservation, or any material part thereof in common. That the lands within said reservation, exclusive of the land in sections 16 are sufficient to secure to each individual Indian entitled thereto, eighty acres thereof in severalty, as provided in said treaty. That neither the Department of the Interior of the United States nor the Indian Department division thereof has, at any time heretofore, attempted to allot or recognized allottments or selections upon any section 16 within said reservation in favor of any member of said tribe of Indians, and said tribe of Indians have for many years before the filing of this bill, ceased to occupy or use any of sections 16 under claim of right under said treaty or otherwise.

XVIII.

That beginning about the year 1899, and from thence hitherto, the defendant, Ethan Allen Hitchcock, as Secretary of the Interior, and the Commissioner of the Indian Office of the United States, and divers agents and servants under them, have set up on behalf of said La Pointe band of Indians, or the members thereof, a claim of interest or title in and to sections 16 aforesaid in the reservation townships aforesaid, paramount and adverse to the title of the State of Wisconsin, and have claimed and continue to claim that said sections 16 are still held by the United States in trust for said Indians to the same extent as other lands in said reserved townships, and have forbidden purchasers of such lands holding patents from the state to enter or make improvements or cut any timber thereon, and have thereby cast a cloud upon the title of the state and its grantees to said lands, and have interfered with, and are continuing to interfere with the use and enjoyment of the same by the owners thereof.

XIX.

That said lands so in dispute between the complainant State of Wisconsin, and the defendant Ethan Allen Hitchcock as Secretary of the Interior of the United States, acting on behalf of said Indians, amount in the aggregate to about thirty-eight hundred and forty (3840) acres of a market value of over fifty thousand ($50,000) dollars. That by Chap. 95 of the Laws of the State of Wisconsin for the year 1903, approved April 20, 1903, the Attorney General of the State of Wisconsin was duly authorized to institute proceedings in this court under the provisions of the act of congress passed March 2, 1901, and

hereinbefore referred to, to determine the rights of said state to what are commonly known as school lands, within any reservation or Indian cession within said state, where any Indian tribe claims any right to or interest in said lands, or to the disposition thereof by the United States, and particularly to determine the title of the lands embraced within sections sixteen in the several townships constituting the present Bad River or La Pointe, and the Flambeau Indian reservations within said state.

In consideration whereof, and for as much as your orator is remediless in the premises, and can have no adequate relief except in this court; and to the end therefore, that the defendant may, if he can, show why your orator should not have the relief prayed, and to the end that the defendant may make full, true, direct and perfect answer to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived; and to the end that the title of your orator to the lands hereinbefore described and referred to, and that the title to said lands be decreed to be in your orator, and to the end that the defendant, his officers, servants and employes, and the officers, servants and employes of the said Department of which he is the official head, be restrained by injunction issuing out of this court, from in any manner interfering with the use, possession or enjoyment of any part of said lands, or of interfering with the exercise by your orator, or its grantees, of acts of ownership of said lands.

May it please Your Honors to grant unto your orator not only a writ of injunction, conformably to the prayer of this bill, by a writ of subpoena issuing out of, and under the seal of this Honorable Court, directed to the defendant Ethan Allen Hitchcock, Secretary of the Interior of the United States, commanding him under a certain penalty to be therein inserted, on a day certain to be and appear and answer (but not under oath) to this bill of complaint, and to further stand to and abide such

order and decree as shall be made herein agreeably to equity and good conscience.

And your orator will ever pray.

L. M. STURDEVANT,
Attorney General of Wisconsin.

T. W. SPENCE,
Of Counsel for State of Wisconsin.

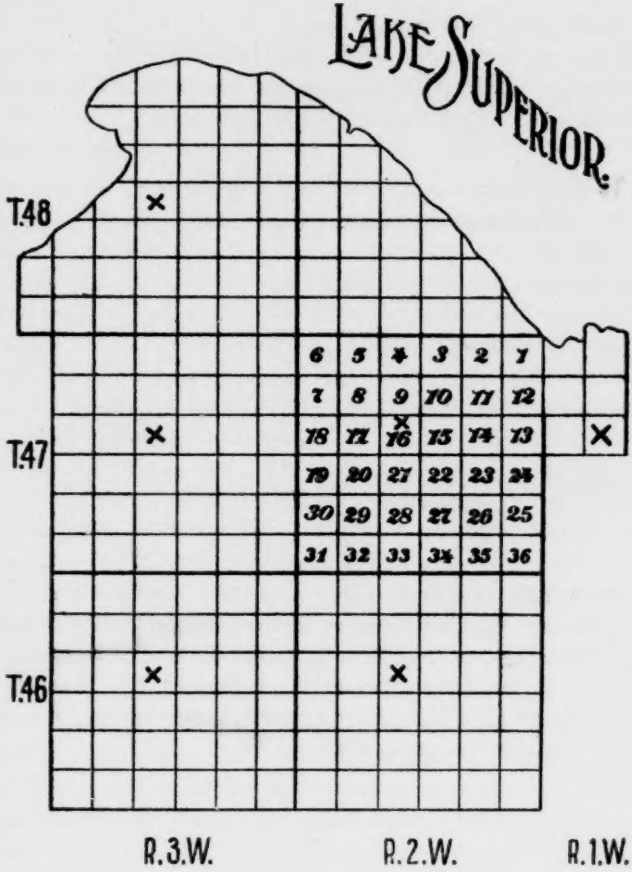
UNITED STATES OF AMERICA,
STATE OF WISCONSIN,
COUNTY OF DANE. } ss.

Personally appeared before me the undersigned, L. M. Sturdevant, who being sworn in the foregoing cause, on oath says he is the Attorney General of the State of Wisconsin, and as such directed the filing of the foregoing bill. That all of the facts set forth in said bill are true to the best of his knowledge, information and belief.

.....,

Sworn to and subscribed before me this
day of March, A. D. 1904.

.....


LAKE SUPERIOR.
T.48
T.47
T.46
6 5 4 3 2 1
7 8 9 10 11 12
18 17 16 15 14 13
19 20 21 22 23 24
30 29 28 27 26 25
31 32 33 34 35 36
R.3.W.
R.2.W.
R.1.W.

FILE COPY.

No._____

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 12 ORIGINAL.

THE STATE OF WISCONSIN

vs.

ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR.

IN EQUITY.

AMENDED BILL.

STATE OF WISCONSIN,

BY

L. M. STURDEVANT, ATTORNEY GENERAL OF WISCONSIN.

T. W. SPENCE, OF COUNSEL,

MILWAUKEE, WIS.

E. E. TATE & COMPANY, PRINTERS, MILWAUKEE

In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE STATE OF WISCONSIN, vs. ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR.	IN EQUITY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States Sitting in Equity:

The State of Wisconsin, by its Attorney General, L. M. Sturdevant, and T. W. Spence, special counsel, by leave of Court first had and obtained, files this, its amended bill of complaint, against Ethan Allen Hitchcock, who is Secretary of the Interior of the United States, and who is a citizen of the State of Missouri.

And whereupon your orator complains and says:

I.

That in and by Section 7 of an Act of Congress of the United States to ENABLE THE PEOPLE OF WISCONSIN TERRITORY TO FORM A CONSTITUTION AND STATE GOVERNMENT AND FOR THE ADMISSION OF SUCH STATE INTO THE UNION, approved August 6, 1840, it was enacted as follows:

"Section 7. And be it further enacted that the following propositions are hereby submitted to the conven-

tion which shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States.

1. That section numbered 16 in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

That on February 1, 1848, the constitutional convention of the people of said territory, duly called in accordance with said enabling act of congress, adopted a constitution which was thereafter duly ratified by vote of the people of said territory on the 2d day of March, 1848, in accordance with the provisions of the enabling act aforesaid and the provisions of said constitution.

That in and by Section 2 of Article 2 of said constitution all of the propositions of the enabling act of congress aforesaid were accepted, ratified and confirmed, including the provisions of Section 7 thereof hereinbefore set forth.

II.

That following the adoption of said constitution, by an act of congress of the United States, approved May 29, 1848, said State of Wisconsin was duly admitted into the Union on equal footing with the original states in all respects whatsoever, with the following boundaries, to-wit: Beginning at the northeast corner of the State of Illinois, that is to say, at a point in the center of Lake Michigan, where the line of forty-two degrees and thirty minutes of north latitude crosses the same; thence running

with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the channel of said river to the Brule River; thence up said last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South Islands, in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the Saint Louis River; thence up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the river Saint Croix; thence down the main channel of the said river to the Mississippi; thence down the center of the main channel of that river to the northwest corner of the State of Illinois; thence due east with the northern boundary of the State of Illinois to the place of beginning.

III.

That by virtue of the enabling act aforesaid and the acceptance of its provisions in the constitution of the State of Wisconsin and the admission of said State into the Union, said State of Wisconsin acquired the fee of Sections 16 in all the lands belonging to the United States at the time of the admission of said State into the Union and theretofore surveyed, and the right to the fee in Sections 16 in all lands so owned by the United States whenever and as soon as the same should be surveyed, within the whole of the territory hereinbefore described.

IV.

That prior to the 28th day of March, 1843, almost the entire northern half of the above territory and of the present boundaries of the State of Wisconsin, including the lands lying between Lake Superior on the north, Green Bay and Fox River on the east, the latitude of Plover Portage on the Wisconsin River on the south and the Mississippi River on the west, was *unceded* Indian land occupied in the main by various branches of the tribe of Chippewa Indians and in a lesser part by the tribes of Menomonees and Winnebagoes.

That on the 28th day of March, 1843, a treaty was made and concluded at La Pointe, on Lake Superior, in the then Territory of Wisconsin, between the said Chippewa Indians and Robert Stuart, commissioner on the part of the United States, a copy of which is as follows:

"Article 1. The Chippewa Indians of the Mississippi and Lake Superior *cede to the United States* all the country within the following boundaries, viz.: Beginning at the mouth of Chocolate River of Lake Superior; thence northwardly across said lake to intersect the boundary line between the United States and the Province of Canada; thence up said Lake Superior to the mouth of the St. Louis or Fond du Lac River, (including all the islands in said lake); thence up said river to the American Fur Company's trading-post, at the southwardly bend thereof, about twenty-two miles from its mouth; thence south to intersect the line of the treaty of 29th of July, 1837, with the Chippewas of the Mississippi; thence along said line to its southeasterly extremity, near the Plover Portage on the Wisconsin River; thence northeasterly, along the boundary line, between the Chippewas and

Menomonees, to its eastern termination, (established by the treaty held with the Chippewas, Menomonees and Winnebagoes at Butt des Morts, August 11, 1827), on the Skonawby River of Green Bay; thence northwardly to the source of the Chocolate River; thence down said river to its mouth, the place of beginning; it being the intention of the parties to this treaty to include in this cession all the Chippewa lands eastwardly of the aforesaid line, running from the American Fur Company's trading-post, on the Fond du Lac River, to the intersection of the line of the treaty made with the Chippewas of the Mississippi, July 29th, 1837.

Article 2. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

Article 3. It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands shall be the common property and home of all the Indian party to this treaty.

Article 4. In consideration of the foregoing cession, the United States engage to pay to the Chippewa Indians of the Mississippi and Lake Superior, annually, for twenty-five years, twelve thousand five hundred (12,500) dollars in specie, ten thousand five hundred (10,500) dollars in goods, two thousand (2,000) dollars in provisions and tobacco, two thousand (2,000) dollars for

the support of two blacksmiths' shops, (including pay of smiths and assistants, and iron, steel, etc.,) one thousand (1,000) dollars for the pay of two farmers, twelve hundred (1,200) dollars for pay of two carpenters, and two thousand (2,000) dollars for the support of schools for the Indians party to this treaty; and further the United States engage to pay the sum of five thousand (5,000) dollars as an agriculture fund, to be expended under the direction of the Secretary of War. And also the sum of seventy-five thousand (75,000) dollars shall be allowed for the full satisfaction of their debts within the ceded district, which shall be examined by the commissioner to this treaty, and the amount to be allowed decided by him, which shall appear in a schedule hereunto annexed. The United States shall pay the amount so allowed within three years.

Whereas, the Indians have expressed a strong desire to have some provision made for their half-breed relatives, therefore it is agreed that fifteen thousand (15,000) dollars shall be paid to said Indians, next year, as a present, to be disposed of as they together with their agent, shall determine in council.

Article 5. Whereas, the whole country between Lake Superior and the Mississippi has always been understood as belonging in common to the Chippewas, party to this treaty; and whereas, the bands bordering on Lake Superior have not been allowed to participate in the annuity payments of the treaty made with the Chippewas of the Mississippi, at St. Peters, July 29, 1837, and whereas all the unceded lands belonging to the aforesaid Indians are hereafter to be held in common, therefore, to remove all occasions for jealousy and discontent, it is agreed that

all the annuity due by said treaty as also the annuity due by the present treaty, shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share.

Article 6. The Indians residing on the Mineral district shall be subject to removal therefrom at the pleasure of the President of the United States.

Article 7. This treaty shall be obligatory upon the contracting parties when ratified by the President and Senate of the United States.

Proclaimed March 28, 1843.

VI.

That in compliance with Article 4 of said treaty, the United States paid the consideration for said lands so ceded, in strict accordance with the stipulations therein contained, to-wit: an aggregate sum of money and merchandise amounting to eight hundred and sixty thousand dollars, and all the title of said Indians in and to said lands was thereupon and thereby extinguished except a mere temporary right of occupancy. That the lands so ceded by said treaty embraced all of the lands hereinafter described, the title to which is claimed by the State of Wisconsin.

VII.

That by the terms of the treaty aforesaid the said Chippewa Indians released to the United States prior to the passage of the enabling act of congress aforesaid and to the adoption of the constitution of the State of Wisconsin and to the acceptance of the school land grant therein contained by said State, all of their claim of title

or interest in or to said lands and each and every part thereof, and ceded the same to the United States which thereupon became the absolute owner thereof free from any claim of said Indians, and the State of Wisconsin upon its admission to the Union as aforesaid, became vested with an absolute right in and to all the sections sixteen, within said territory, subsequently surveyed by the United States, with the right in said State to have any temporary possession or occupancy of the Indians aforesaid terminated by the United States.

VIII.

That at and prior to the making of the treaty of 1843 hereinbefore set out, the said Chippewa Indians claimed ownership and right of occupancy in large body of lands in what is now the State of Minnesota, including the lands particularly described in Article 2 of the treaty of September 20th, 1854, hereinafter set out in full. That under the terms of Article 2 of said treaty of 1843 it was contemplated that all of the Chippewa Indians scattered over the territory ceded to the United States by said treaty, should be removed and permanently located on their lands aforesaid within the boundaries of the present State of Minnesota, but that some of the bands and members of said tribe not wishing to be so removed procured the United States to enter into the farther and additional treaty with them on the 30th day of September, 1854, for the cession of certain of their lands within the boundaries of the present State of Minnesota in consideration among other things of the reservation to them of certain lands embraced within their cession in the said treaty of 1843, of which treaty of 1854 the following is a copy:

FRANKLIN PIERCE, President of the United States of America, to all and singular to whom these presents shall come, greeting:

WHEREAS, a treaty was made and concluded at LaPointe, in the State of Wisconsin, on the thirtieth day of September, eighteen hundred and fifty-four, by Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men, which treaty is in the words following, to-wit:

Articles of a treaty made and concluded at LaPointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men,

Article 1. The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary line, to-wit: Beginning at a point where the east branch of Snake River crosses the southern boundary-line of the Chippewa Country, running thence up the said branch to its source, thence nearly north, in a straight line, to the mouth of East Savannah River, thence up the St. Louis River to the mouth of East Swan River, thence up the East Swan River to its source, thence in a straight line to the most westerly bend of Vermillion River, and thence down the Vermillion River to its mouth.

The Chippewas of the Mississippi hereby consent and agree to the foregoing cession, and consent that the whole amount of the consideration money for the country ceded

above shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi all their interest in and claims to the lands heretofore owned by them in common, lying west of the above boundary line.

Article 2. The United States agrees *to set apart and withhold from sale,* for the use of the Chippewas of Lake Superior, the following described tracts of land, viz.:

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan, township fifty-one north, range thirty-three west; township fifty-one north, range thirty-two west; the east half of township fifty north, range thirty-three west; the west half of township fifty north, range thirty-two west; and all of township fifty-one north, range thirty-one west, lying west of Huron Bay.

2d. For the LaPointe band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the center of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of township forty-six north, range two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground.

3. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

4th. For the Fond du Lac bands, a tract of land bounded as follows: Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary line heretofore described, thence north along said boundary line to the mouth of the Savannah River, thence down the St. Louis River to the place of beginning. And if said tract shall contain less than one hundred thousand acres, a strip of land shall be added on the south side thereof large enough to equal such deficiency.

5th. For the Grand Portage band, a tract of land bounded as follows: Beginning at a rock a little east of the eastern extremity of Grand Portage Bay, running thence along the lake shore to the mouth of a small stream called by the Indians Maw-ske-gwaw-caw-maw-se-be, or Cranberry Marsh River, thence up said stream, across the point to Pigeon River, thence down Pigeon River to a point opposite the starting point, and thence across to the place of beginning.

6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in

the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

7th. Each head of a family, or a single person over twenty-one years of age at the present time, of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

Article 3. The United States will define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or a single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right-

of-way through the same, compensation being made therefor as in other cases.

Article 4. In consideration of and payment for the country hereby ceded, the United States agrees to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to-wit: Five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in agricultural implements and cattle, carpenter's and other tools, and building materials, and three thousand dollars for moral and educational purposes, of which last sum three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also, the further sum of six thousand dollars in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready made clothing, to be distributed among the young men of the nation at the next annuity payment.

Article 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much longer as the President may think proper, at each of the points herein set apart for the residence of the Indians, the same to be in lieu of all the employes to

which the Chippewas of Lake Superior may be entitled under the previous existing treaties.

Articles 6. The annuities of the Indians shall not be taken to pay the debts of individuals, but satisfaction for the depredations committed by them shall be made by them in such manner as the President may direct.

Article 7. No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the residence of the Indians, and the sale of the same shall be prohibited on the territory hereby ceded, until otherwise ordered by the President.

Article 8. It is agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from former treaties existing prior to the year 1847.

Article 9. The United States agree that an examination shall be made and all sums that may be found equitably due to the Indians, for arrearages of annuity or other thing, under the provisions of former treaties, shall be paid as the chiefs may direct.

Article 10. All missionaries, and teachers, and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed, to the amount of one-quarter section each.

Article 11. All annuity payments to the Chippewas of Lake Superior shall hereafter be made at L'Anse, LaPointe, Grand Portage, and on the St. Louis River;

and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded shall have the right to hunt and fish therein, until otherwise ordered by the President.

Article 12. In consideration of the poverty of the Bois Forte Indians, who are parties to this treaty, they having never received any annuity payments, and of the great extent of that part of the ceded country owned exclusively by them, the following additional stipulations are made for their benefit. The United States will pay the sum of ten thousand dollars, as their chiefs in open council may direct, to enable them to meet their present just engagements. Also, the further sum of one thousand dollars, in five equal annual payments in blankets, cloth, nets, guns, ammunition and such other articles of necessity as they may require.

They shall have the right to select their reservation at any time hereafter under the direction of the President; and the same may be equal in extent, in proportion to their numbers, to those allowed the other bands, and be subject to the same provisions.

They shall be allowed a blacksmith, and the usual smith-shop supplies, and also two persons to instruct them in farming, whenever in the opinion of the President it shall be proper, and for such length of time as he shall direct.

It is understood that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as the Chippewas of Lake Superior; *Provided*, That the stipulation by which the Chippewas of Lake Superior relinquishing their right to land west

of the boundary-line shall not apply to the Bois Forte band, who are parties to this treaty.

Article 13. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

Proclaimed January 29, 1855.

That all of the lands described in Article 1 of said last named treaty and ceded thereby to the United States lie within the boundaries of the present State of Minnesota, and constitute no part of the land embraced in the treaty of March 28, 1843, hereinbefore set forth.

IX.

That all of the lands described in Subdivision 2 of Article 2 of said treaty of 1854 and therein agreed to be set apart and withheld from sale for the LaPointe band of said Chippewa Indians and all of the tracts of land referred to in the 3d Subdivision of Article 2 of said last named treaty lying about Lac Du Flambeau and on Lac Court Oreilles, the boundaries of which were thereafter agreed upon between the United States and said bands of Indians under the direction of the President, as hereinafter more particularly stated, were included and embraced in the lands ceded to the United States by said treaty of 1843, and were lands in which the State of Wisconsin had, under the enabling act and state constitution aforesaid, become entitled to every sixteenth section thereof.

X.

That the lands described in Subdivision 2 of Article 2 of said treaty of 1854, embraced all of townships 46 and 47 north, ranges 2 and 3 west, and portions of town-

ship 48 north, range 3 west, including section 16 as afterwards surveyed, and a portion of township 47 north, range 1 west, including section 16 therein, as afterwards surveyed:

That in the year 1847, the east line of township numbered 46 north, of range 2 west, and the west line of township number 47 north, range 1 west, were duly surveyed by the United States; that in the year 1852, all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times thereafter in the years 1856, 1858 and 1873.

XI.

That for the purpose of setting apart a tract of land lying about Lac Du Flambeau for other Wisconsin bands of said Indians mentioned in Subdivision 3 of Article 2 of said treaty, surveys were made under the direction of the United States as follows: In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860, the east line of said towns 40 and 41-4 east; and in September, 1861, the south, east and west lines of towns 40 and 41-5 east; and in August, 1864, the south and west lines of townships 40 and 41-4 east; and in July, 1865, each of said townships was subdivided by such surveys, into sections.

That on June 22, 1866, all of the lands now claimed to be within the reservation of said Wisconsin bands about Lac Du Flambeau and covered by said Subdivision

3 of Article 2 aforesaid, were, by order of W. T. Otto, Acting Secretary of the Interior of the United States, withdrawn from sale until such time as the boundaries of the reservation contemplated by said treaty should be fully defined.

That no further and later action appears to have been taken by the United States in regard to said Lac Du Flambeau reservation, and said reservation has been hitherto held and claimed by said Wisconsin bands of said tribe under the terms of said order of June 26, 1866; that annexed hereto is a copy of all of the executive orders made in regard to said last named reservation, which copy is marked Exhibit "A," and made a part of this bill.

XII.

That pursuant to the provisions of Subdivision 3 of Article 2 aforesaid for the withdrawal and setting apart of three townships of land about Lac Court Oreilles for other Wisconsin bands of said Chippewa Indians, certain lands in townships 39 north, ranges 7 and 9 west, and township 40 north, ranges 6, 7 and 8 west, were, by orders from the General Land Office of the United States, dated November 22, 1859, and April 4, 1865, withdrawn from market from which to select a permanent reservation for said bands of Indians, and by order of C. Delano, Secretary of the Interior of the United States, dated March 1, 1873, a permanent reservation for the Lac Court Oreilles bands of Chippewa Indians was fixed and determined, but in the selection of said lands and the fixing of such permanent reservation, all sections 16 therein were excluded; that annexed hereto is a copy of the several executive orders fixing the boundaries and limits

of said Lac Court Oreilles reservation, which copy is marked Exhibit "B," and made a part of this bill.

XIII.

That neither the boundaries nor the description of the lands to be embraced in the aforesaid Lac Du Flambeau and Lac Court Oreilles reservations were fixed or determined by the United States until after the lands embraced within such reservations had been surveyed and subdivided into sections and until after the title to sections 16 within such reservations had absolutely vested in the State of Wisconsin under the facts hereinbefore stated.

That a plat of said lands to be reserved under said treaty of 1854 to said La Pointe bands of Indians is hereto annexed, marked Exhibit "C," and made a part of this bill; that a plat of the lands withdrawn from sale and set apart for said Lac Du Flambeau Indians is hereto annexed, marked Exhibit "D," and made a part of this bill.

XIV.

That in and by the terms of Article 3 of said treaty of 1854, the power was expressly reserved to the United States to make changes in the boundaries of the tracts so reserved for said several bands of Indians or otherwise as might be necessary to prevent interference with any vested rights, and the United States exercised said power in excluding said sections 16 from said Lac Court Oreilles reservation, but omitted to exercise the same power as to said La Pointe and Lac Du Flambeau reservations.

XV.

That under the enabling act of congress aforesaid, and under the said state constitution, and under and in view of the cession of their lands by said Chippewa Indians contained in said treaty of 1843, all of the lands surveyed and to be surveyed as sections 16 of the various townships within the territory covered by said treaty vested in the State of Wisconsin, and said State of Wisconsin has at all times heretofore since its admission to the Union claimed a right to the fee of all lands in sections 16 in the several townships within said reservations and since the sectional survey thereof by the United States has claimed the actual fee in said sections and has exercised dominion and ownership over the same and has issued sundry and divers patents to divers persons and corporations for portions thereof, sundry of which persons and corporations, grantees of the State as aforesaid, have also exercised acts of ownership thereof and have paid taxes and made improvements thereon, and have cut and hauled timber therefrom until forbidden by orders of the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, as hereinafter more particularly mentioned. That patents for all of said sections 16 within said La Pointe reservation have heretofore been issued by said State to divers parties; and patents upon about fourteen forties of said sections 16 within said Lac Du Flambeau reservation have been issued by said State to divers parties and there still remain about twenty-nine forties in said sections 16 within said Lac Du Flambeau reservation, the title to which is still in and claimed by said State.

XVI.

That under the treaty of 1854 aforesaid and in carrying out its provisions, the said Secretary of the Interior has proceeded, through the United States Indian Department, to allot from time to time to the various members of said tribes of La Pointe bands of Indians and to various members of the Wisconsin bands on said Lac Du Flambeau reservation eighty acres per capita of lands within said reservations and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States, and have terminated their tribal relations, and have ceased to occupy any material part of said reservation in common.. That the lands within said reservations exclusive of the land in sections 16, are sufficient to secure to each individual Indian entitled thereto eighty acres thereof in severalty, as provided in said treaty; that neither the Department of the Interior of the United States nor the Indian Department of the United States has at any time heretofore attempted to allot or recognized selections upon any section 16 within said reservations in favor of any members of said tribes of Indians, and said tribes of Indians have not occupied, and do not occupy or use any of said sections 16 under claim of right under said treaty or otherwise except as they may from time to time hunt or fish thereon.

XVIII.

That beginning about the year 1899, and from thence hitherto, the defendant, Ethan Allen Hitchcock, as Secretary of the Interior, and the Commissioner of the Indian Office of the United States, and divers agents and

servants under them, have set up on behalf of said La Pointe and other bands of Indians, or the members thereof, a claim of interest or title in and to sections 16 aforesaid in the reservation townships aforesaid, paramount and adverse to the title of the State of Wisconsin, and have claimed and continue to claim that said sections 16 are still held by the United States in trust for said Indians to the same extent as other lands in said reserved townships, and have forbidden purchasers of such lands holding patents from the State to enter or make improvements or cut any timber thereon, and have thereby cast a cloud upon the title of the State and its grantees to said lands, and have interfered with, and are continuing to interfere with the use and enjoyment of the same by the owners thereof.

XIX.

That said lands so in dispute between the complainant, State of Wisconsin, and the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, acting on behalf of said Indians, amount in the aggregate to about fifty-seven hundred and sixty (5760) acres of a market value of over fifty thousand (50,000) dollars. That by Chap. 95 of the Laws of the State of Wisconsin for the year 1903, approved April 20, 1903, the Attorney General of the State of Wisconsin was duly authorized to institute proceedings in this Court under the provisions of the act of congress passed March 2, 1901, and hereinbefore referred to, to determine the rights of said State to what are commonly known as school lands, within any reservation or Indian cession within said State, where any Indian tribe claims any right to or interest in said lands, or to the disposition

thereof by the United States, and particularly to determine the title of the lands embraced within sections sixteen in the several townships constituting the present Bad River or La Pointe, and the Flambeau Indian reservations within said State.

In consideration whereof, and for as much as your orator is remediless in the premises, and can have no adequate relief except in this Court; and to the end therefore, that the defendant may, if he can, show why your orator should not have the relief prayed, and to the end that the defendant may make full, true, direct and perfect answer to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived; and to the end that the title of your orator to the lands hereinbefore described and referred to, and that the title to said lands be decreed to be in your orator, and to the end that the defendant, his officers, servants and employes, and the officers, servants and employes of the said department of which he is the official head, be restrained by injunction issuing out of this Court, from in any manner interfering with the use, possession or enjoyment of any part of said lands, or of interfering with the exercise of your orator, or its grantees, of acts of ownership of said lands.

May it please Your Honors to grant unto your orator not only a writ of injunction, conformably to the prayer of this bill, by a writ of subpoena issuing out of, and under the seal of this Honorable Court, directed to the defendant, Ethan Allen Hitchcock, Secretary of the Interior of the United States, commanding him under a certain penalty to be therein inserted, on a day certain to be and appear and answer (but not under oath) to

this bill of complaint, and to further stand to and abide such order and decree as shall be made herein agreeably to equity and good conscience.

And your orator will ever pray.

L. M. STURDEVANT,
Attorney General of Wisconsin.

T. W. SPENCE,
Of Counsel for State of Wisconsin.

UNITED STATES OF AMERICA,
STATE OF WISCONSIN,
COUNTY OF DANE. } ss.

Personally appeared before me the undersigned, L. M. Sturdevant, who being sworn in the foregoing cause, on oath, says he is the Attorney General of the State of Wisconsin, and as such directed the filing of the foregoing bill. That all of the facts set forth in said bill are true to the best of his knowledge, information and belief.

L. M. Sturdevant.

Sworn to and subscribed before me this
21st day of February, A. D. 1905.

R. E. Smith.....
Notary Public.
Wis.

EXHIBIT "A."

Lac De Flambeau Reserve.

[Area 52½ square miles; treaty September 30, 1854; act of May 29, 1872 (17 Stat. 190).]

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, June 22, 1866.

SIR: Provision is made in the third section of the second article of the treaty of September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, for setting apart and withholding from sale a tract of land lying about Lac De Flambeau, "equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed by the President." (U. S. Statutes at Large, vol. 10, p. 1109.)

As the lands adjoining this lake are about to be offered at public sale, it is important that immediate action should be taken in withdrawing from sale lands necessary for this reservation. The following-described lands were included within a survey made to define the boundaries of this reservation in June, 1863, by A. C. Stunz, surveyor, under the direction of the Superintendent of Indian Affairs, viz.: Sections 5 and 6, township 39 north, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 40 north, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 41 north, range 6 east; all of township 41 north, range 5 east; sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, township 41 north, range 4 east; sections 1, 2, 11, 12, 13 and 14, township 40 north, range 4 east; sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18; township 40 north, range 5 east; the area of the same being 55,630.26 acres.

As this is a less amount of land than is provided for in the treaty for said reservation, I would respectfully recommend that in addition to the foregoing there be reserved from sale, until such time as the boundaries of the reservation are fully defined, the following described lands which are contiguous to those included in the survey above stated, viz.: Sections, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, township 40 north, range 5 east; sections 3, 10, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36, township 40 north, range 4 east.

Very respectfully, your obedient servant,

D. N. COOLEY,
Commissioner.

HON. JAMES HARLAN,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE.
Washington, June 27, 1866.

SIR: I have received your letter of the 26th instant inclosing a copy of a letter from the Commissioner of Indian Affairs, dated the 22d, requesting the withholding from sale of certain lands on account of the Lac De Flambeau band of Chippewas, under third section, second article, of the treaty of September 30, 1854.

In compliance with your instructions the necessary entries have been made in the records of this office, and the register and receiver at Stevens Point, Wis., have this day been directed to withhold from sale the land described in the Commissioner's letter. A copy of my letter is inclosed herewith.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Acting Commissioner.

HON. JAMES HARLAN,
Secretary of the Interior.

[Inclosure.]

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE.

Washington, June 27, 1866.

GENTLEMEN: In pursuance of the order of the Secretary of the Interior of the 26th instant, the following-described lands will be withheld from settlement or sale on account of the Lac De Flambeau band of Chippewa Indians, to-wit: Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36, township 40, range 4 east; sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, township 41, range 4 east; all of township 40, range 5 east; all of township 41, range 5 east; sections 5 and 6, township 39, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 40, range 6 east; and sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 41, range 6 east.

These lands will be held in reservation for the purpose mentioned, and consequently will not be subject to settlement or sale, and you will so enter them on your plats and tract- books, and advise me when that has been done.

JOS. S. WILSON,
Acting Commissioner.

REGISTER AND RECEIVER,
Stevens Point, Wis.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 28, 1866.

SIR: For your information I inclose herewith copy of letter of the Commissioner of the General Land Office, transmitting to this Department copy of the order of withdrawal from public sale of certain lands in the

vicinity of Lac De Flambeau, Wis., as directed by my letter of the 26th instant.

Very respectfully, your obedient servant,

JAS. HARLAN,

HON. D. N. COOLEY, *Secretary.*

Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

June 27, 1866.

Register and Receiver, Stevens Point, Wis.:

GENTLEMEN:

In pursuance of the order of the Secretary of the Interior of the 26th inst., the following described lands will be withheld from settlement or sale on account of the Lac De Flambeau band of Chippewas, to-wit:

Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36, *Town 40, R. 4 E.* Sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, *Town 41, R. 4 E.*

All of Town 40, R. 5 E.

All of Town 41, R. 5 E.

Sections 5 and 6, *Town 39, R. 6 E.*

Sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, *Town 40, R. 6 E.*, and Sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, *Town 41, R. 6 E.*

These lands will be held in reservation for the purpose mentioned, and consequently will not be subject to settlement or sale, and you will so enter them on your plats and tract books, and advise me when that has been done.

Very respectfully, etc.,

JOS. S. WILSON,

Actg. Commissioner.

EXHIBIT "B."

Lac Court Oreilles Reserve.

WASHINGTON, D. C., February 17, 1873.

SIR: I have the honor to inclose herewith, in accordance with your instructions dated December 18, 1872, a list of the lands selected as a permanent reservation for the Lac Court Oreille bands, Chippewas of Lake Superior, after consultation with the chiefs and headmen.

It is believed that the above-mentioned selection, while satisfactory to the Indians and fulfilling the spirit of the treaty which it is made, fully secures the interests of the General Government, as well as those of the State of Wisconsin.

It is of the greatest importance that a survey of the exterior boundaries of the reservation be made at the earliest practicable period. The boundary marks of the first survey are generally indistinct, and, besides, do not conform to the boundaries as now proposed.

Persons may trespass with little danger of discovery or hindrance now, but would be prevented if the boundaries of the reservation were distinctly defined and marked so that the Indians themselves could understand them.

Very respectfully, your obedient servant,

S. N. CLARK,

United States Indian Agent.

HON. H. R. CLUM,

Acting Commissioner of Indian Affairs,

Washington, D. C.

DEPARTMENT OF THE INTERIOR,

Office of Indian Affairs, February 24, 1873.

SIR: I have the honor to submit herewith the follow-

ing selections of land for a permanent reservation for the Lac Court Oreilles bands of Chippewas, of Lake Superior, as recommended in a report to this office from Agent S. N. Clark, under date of the 17th instant, pursuant to instructions of December 18, 1872, amounting in the aggregate to 69,136.41 acres, viz.:

Description	Section	Township	Range	Area
				Acres
SE. ¼ and NE. ¼	3	40	6	266.97
E. ½ and SE. ¼	8	40	6	80.00
NW. ¼ of SW. ¼, S. ½ of NE. ¼ and S. ½ of NW. ¼	9	40	6	200.00
NW. ¼ of NE. ¼, and NW ¼	10	40	6	200.00
E. ½ of NE. ¼, E. ½ of SE. ¼ and SE. ¼ of SW. ¼ or lot 1	17	40	6	198.26
SE. ¼	18	40	6	160.00
NE. ¼	19	40	6	160.90
All	20	40	6	579.68
NW. ¼ of NW. ¼	21	40	6	40.00
Lot No. 1	27	40	6	62.36
Lots 2 and 3	28	40	6	96.40
SW. ¼ of SE. ¼ (lot 5) and SW. ¼ (lots 1, 6, and 7)	28	40	6	165.24
All	29	40	6	450.77
S. ½	30	40	6	248.24
All	31	40	6	439.03
NW. ¼ (lots 1, 2, and 3) and N. ½ of NE. ¼	32	40	6	193.95
All	33	40	6	562.03
All	34	40	6	584.21
SW. ¼ of SW. ¼, (lots 1 and 2)	35	40	6	38.07
Total in township				4,725.21
S. ½, (lots 1, 2, 3, 4, and 5)	26	40	7	200.35
SE. ¼, (lots 1 and 2)	27	40	7	131.60
E. ½	34	40	7	284.59
All	35	40	7	457.88
Part of SE ¼ (lots 2 and 3) and SE. ¼ of SW. ¼ (lot 4)	36	40	7	119.75
Total in township				1,194.17
All	1	40	8	422.98
All	2	40	8	480.62
E. ½, E. ½ of SW. ¼ and NW. ¼ (lots 2 and 3)	6	39	7	470.96
All	7	39	7	613.04
W. ½, lots 1, 2, 3, and SW. ¼ of SE. ¼	8	39	7	534.83
All	3	40	8	534.70
All	4	40	8	537.80
All	5	40	8	532.00
All	6	40	8	453.62
All	7	40	8	554.77
All	8	40	8	603.08
All	9	40	8	640.00
All	10	40	8	640.00
All	11	40	8	640.00
All	12	40	8	640.00
All	13	40	8	640.00
All	14	40	8	640.00
All	15	40	8	640.00
All	17	40	8	445.33
All	18	40	8	186.88
All	19	40	8	1.70
All	20	40	8	165.06
All	21	40	8	606.25
All	22	40	8	608.30
All	23	40	8	594.60
S. ½, NW. ¼, S. ½ of NE ¼ and NW. ¼ of NE. ¼	24	40	8	600.00
All	25	40	8	639.99
All	26	40	8	640.00
All	27	40	8	635.10
All	28	40	8	442.55
All	29	40	8	507.18
All	30	40	8	462.78
All	31	40	8	380.69
All	32	40	8	132.64
All	33	40	8	557.55
All	34	40	8	640.00
All	35	40	8	640.00
All	36	40	8	520.95
Total in township				18,007.12
All	1	39	7	630.05
All	2	39	7	641.78
N. ½, of NE. ¼, S. ½ of SE ¼ and NE. ¼ of SE. ¼	3	39	7	200.66
All	4	39	7	601.67
All	5	39	7	632.38
All	23	39	8	618.20
All	24	39	8	583.15
All	25	39	8	640.00
All	26	39	8	398.20
All	27	39	8	599.59
All	28	39	8	640.00
All	29	39	8	640.00
All	30	39	8	637.86

Description	Section	Township	Range	Area
				Acres
NE. ¼ of NE. ¼, lots 1, 2, 3, 4, 5, and 6, and SE. ¼ of SE. ¼	9	39	7	315.91
S. ½, NE. ¼, S. ½ of NW. ¼ and NE. ¼ of NW. ¼	10	39	7	600.00
All	11	39	7	640.00
All	12	39	7	640.00
All	13	39	7	640.00
All	14	39	7	640.00
All	15	39	7	640.00
W. ½, SE. ¼, W. ½, NE. ¼ and SE. ¼ of NE. ¼	17	39	7	600.00
All	18	39	7	609.76
All	19	39	7	611.76
All	20	39	7	640.00
All	21	39	7	640.00
All	28	39	7	640.00
All	29	39	7	640.00
N. ½, NE. ¼ of SW. ¼, N. ½ of SE. ¼ and SE. ¼ of SE. ¼	30	39	7	467.46
E. ½, SW. ¼, W. ½ of NW. ¼ and SE. ¼ of NW. ¼	31	39	7	574.00
All	32	39	7	640.00
All	33	39	7	640.00
Total in township				15,143.36
All	1	39	8	573.77
All	2	39	8	625.58
All	3	39	8	618.00
All	4	39	8	617.88
All	5	39	8	401.37
All	6	39	8	118.87
All	7	39	8	594.75
All	8	39	8	520.10
All	9	39	8	640.00
All	10	39	8	640.00
All	11	39	8	640.00
All	12	39	8	640.00
All	13	39	8	640.00
All	14	39	8	640.00
All	15	39	8	640.00
All	17	39	8	640.00
NW. ¼, N. ½ of SW. ¼, N. ½ of SE. ¼ and SE ¼ of SE. ¼	18	39	8	352.22
S. ½, NE. ¼, SE. ¼ of NW. ¼ and W. ½ of NW. ¼	19	39	8	592.28
All	20	39	8	640.00
All	21	39	8	640.00
All	22	39	8	640.00

Description	Section	Township	Range	Area
				Acres
S. ½, NW. ¼, S. ½ of NE. ¼, NW. ¼ of NE. ¼	31	39	8	595.88
All	32	39	8	640.00
All	33	39	8	640.00
All	34	39	8	640.00
All	35	39	8	636.00
All	36	39	8	640.00
Total in township				20,604.60
All	4	38	8	738.92
All	5	38	8	761.30
All	6	38	8	780.49
All	7	38	8	683.50
All	8	38	8	640.00
S. ½, NE. ¼, E ½ of NW. ¼ and SW. ¼ of NW. ¼	9	38	8	600.00
All	17	38	8	640.00
All	18	38	8	627.88
Total in township				5,422.09
All	1	38	9	701.26
All	12	38	9	640.00
All	13	38	9	640.00
Total in township				2,071.26
Lot 2	1	39	9	48.60
All	24	39	9	640.00
All	25	39	9	640.00
All	36	39	9	640.00
Total in township				1,968.80

SUMMARY.

Withdrawn Nov. 22, 1859	40	6	4,725.21
Do	40	7	1,194.17
Do	40	8	18,007.12
Do	39	7	15,143.36
Do	39	8	20,604.60
Do	38	8	5,422.09
Withdrawn April 4, 1865	38	9	2,071.26
Do	39	9	1,968.60
Aggregate withdrawn			69,136.41

I now respectfully recommend that the remainder of lands withdrawn from market by orders from the General Land Office of November 22, 1859, and April 4, 1865, from which to select a permanent reservation for said Indians, be restored to market.

Very respectfully, your obedient servant,

H. R. CLUM,

Acting Commissioner.

The HON. SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR, March 1, 1873.

SIR: I transmit herewith copy of a letter from the Acting Commissioner of Indian Affairs, dated the 24th ultimo, submitting selections of land for a permanent reservation for the Lac Court Oreilles band of Chippewa Indians of Lake Superior, amounting in the aggregate to 69,136.41 acres.

The recommendation of the Acting Commissioner that the remainder of lands withdrawn from market by orders from the General Land Office of November 22, 1859, and April 4, 1865, from which to select a permanent reservation for said Indians, be restored to market, is hereby approved, and you will be pleased to carry the same into effect.

Very respectfully, your obedient servant,

C. DELANO,

Secretary.

The COMMISSIONER OF THE GENERAL LAND OFFICE.

EXHIBIT "C."

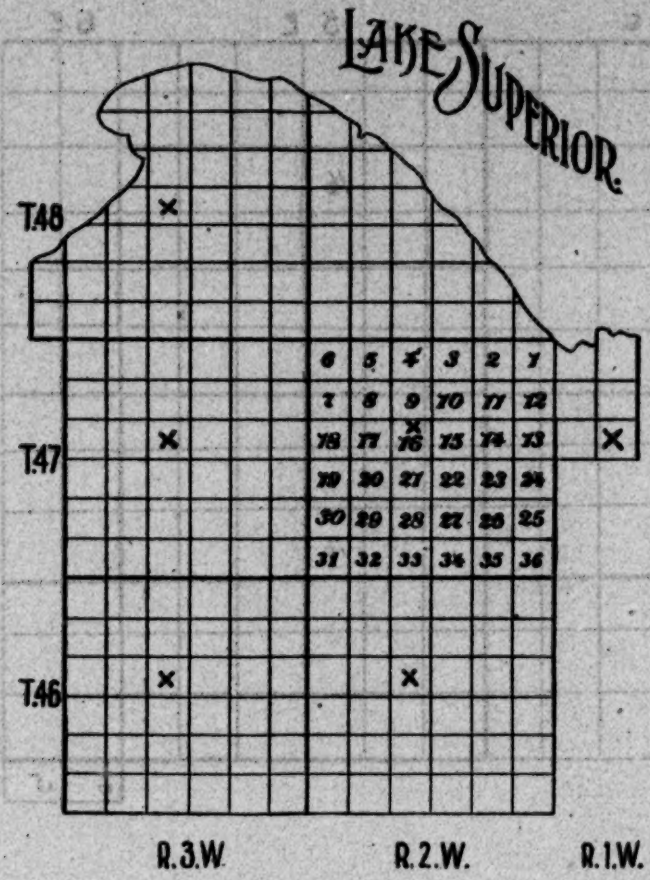
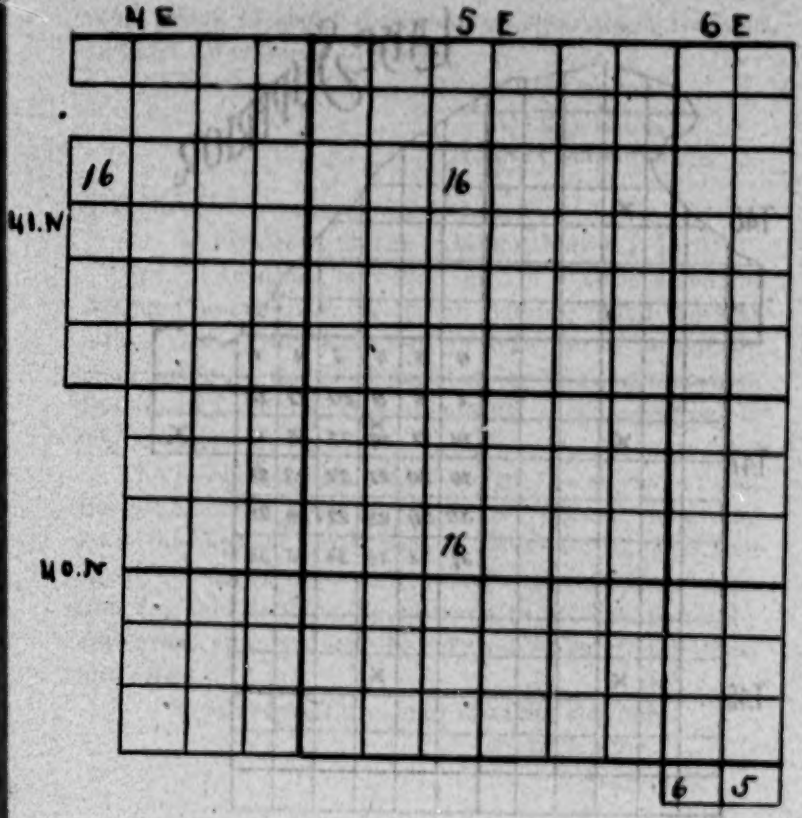


EXHIBIT "D."



FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 12, Original.

THE STATE OF WISCONSIN, COMPLAINANT,

vs.

ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR.

IN EQUITY.

SECOND AMENDED BILL.

STATE OF WISCONSIN,
By L. M. STURDEVANT,
Attorney General of Wisconsin.
T. W. SPENCE,
Of Counsel, Milwaukee, Wis.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 18620

In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE STATE OF WISCONSIN, vs. ETHAN ALLEN HITCHCOCK, Secretary of the Interior.	IN EQUITY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States Sitting in Equity:

The State of Wisconsin, by its Attorney General, L. M. Sturdevant, and T. W. Spence, special counsel, by leave of Court first had and obtained, files this, its amended bill of complaint, against Ethan Allen Hitchcock, who is Secretary of the Interior of the United States, and who is a citizen of the State of Missouri.

And whereupon your orator complains and says:

I.

That in and by Section 7 of an Act of Congress of the United States to ENABLE THE PEOPLE OF WISCONSIN TERRITORY TO FORM A CONSTITUTION AND STATE GOVERNMENT AND FOR THE ADMISSION OF SUCH STATE INTO THE UNION, approved August 6, 1846, it was enacted as follows:

"Section 7. And be it further enacted that the following propositions are hereby submitted to the conven-

tion which shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States.

1. That section numbered 16 in every township of the public lands in said state, and where such section has been sold or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

That on February 1, 1848, the constitutional convention of the people of said territory, duly called in accordance with said enabling act of congress, adopted a constitution which was thereafter duly ratified by vote of the people of said territory on the 2d day of March, 1848, in accordance with the provisions of the enabling act aforesaid and the provisions of said constitution.

That in and by Section 2 of Article 2 of said constitution all of the propositions of the enabling act of congress aforesaid were accepted, ratified and confirmed, including the provisions of Section 7 thereof hereinbefore set forth.

II.

That following the adoption of said constitution, by an act of congress of the United States, approved May 29, 1848, said State of Wisconsin was duly admitted into the Union on equal footing with the original states in all respects whatsoever, with the following boundaries, to-wit: Beginning at the northeast corner of the State of Illinois, that is to say, at a point in the center of Lake Michigan, where the line of forty-two degrees and thirty minutes of north latitude crosses the same; thence running

with the boundary line of the State of Michigan through Lake Michigan, Green Bay, to the mouth of the Menominee River; thence up the channel of said river to the Brule River; thence up said last mentioned river to Lake Brule; thence along the southern shore of Lake Brule in a direct line to the center of the channel between Middle and South Islands, in the Lake of the Desert; thence in a direct line to the headwaters of the Montreal River, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal River to the middle of Lake Superior; thence through the center of Lake Superior to the mouth of the Saint Louis River; thence up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the river Saint Croix; thence down the main channel of the said river to the Mississippi; thence down the center of the main channel of that river to the northwest corner of the State of Illinois; thence due east with the northern boundary of the State of Illinois to the place of beginning.

III.

That by virtue of the enabling act aforesaid and the acceptance of its provisions in the constitution of the State of Wisconsin and the admission of said State into the Union, said State of Wisconsin acquired the fee of Sections 16 in all the lands belonging to the United States at the time of the admission of said State into the Union and theretofore surveyed, and the right to the fee in Sections 16 in all lands so owned by the United States whenever and as soon as the same should be surveyed, within the whole of the territory hereinbefore described.

IV.

That prior to the 28th day of March, 1843, almost the entire northern half of the above territory and of the present boundaries of the State of Wisconsin, including the lands lying between Lake Superior on the north, Green Bay and Fox River on the east, the latitude of Plover Portage on the Wisconsin River on the south and the Mississippi River on the west, was *unceded* Indian land occupied in the main by various branches of the tribe of Chippewa Indians and in a lesser part by the tribes of Menomonees and Winnebagoes.

That on the 28th day of March, 1843, a treaty was made and concluded at La Pointe, on Lake Superior, in the then Territory of Wisconsin, between the said Chippewa Indians and Robert Stuart, commissioner on the part of the United States, a copy of which is as follows:

"Article 1. The Chippewa Indians of the Mississippi and Lake Superior *cede to the United States* all the country within the following boundaries, viz.: Beginning at the mouth of Chocolate River of Lake Superior; thence northwardly across said lake to intersect the boundary line between the United States and the Province of Canada; thence up said Lake Superior to the mouth of the St. Louis or Fond du Lac River, (including all the islands in said lake); thence up said river to the American Fur Company's trading-post, at the southwardly bend thereof, about twenty-two miles from its mouth; thence south to intersect the line of the treaty of 29th of July, 1837, with the Chippewas of the Mississippi; thence along said line to its southeasterly extremity, near the Plover Portage on the Wisconsin River; thence northeasterly, along the boundary line, between the Chippewas and

Menomonees, to its eastern termination, (established by the treaty held with the Chippewas, Menomonees and Winnebagoes at Butt des Morts, August 11, 1827), on the Skonawby River of Green Bay; thence northwardly to the source of the Chocolate River; thence down said river to its mouth, the place of beginning; it being the intention of the parties to this treaty to include in this cession all the Chippewa lands eastwardly of the aforesaid line, running from the American Fur Company's trading-post, on the Fond du Lac River, to the intersection of the line of the treaty made with the Chippewas of the Mississippi, July 29th, 1837.

Article 2. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

Article 3. It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands shall be the common property and home of all the Indian party to this treaty.

Article 4. In consideration of the foregoing cession, the United States engage to pay to the Chippewa Indians of the Mississippi and Lake Superior, annually, for twenty-five years, twelve thousand five hundred (12,500) dollars in specie, ten thousand five hundred (10,500) dollars in goods, two thousand (2,000) dollars in provisions and tobacco, two thousand (2,000) dollars for

the support of two blacksmiths' shops, (including pay of smiths and assistants, and iron, steel, etc.,) one thousand (1,000) dollars for the pay of two farmers, twelve hundred (1,200) dollars for pay of two carpenters, and two thousand (2,000) dollars for the support of schools for the Indians party to this treaty; and further the United States engage to pay the sum of five thousand (5,000) dollars as an agriculture fund, to be expended under the direction of the Secretary of War. And also the sum of seventy-five thousand (75,000) dollars shall be allowed for the full satisfaction of their debts within the ceded district, which shall be examined by the commissioner to this treaty, and the amount to be allowed decided by him, which shall appear in a schedule hereunto annexed. The United States shall pay the amount so allowed within three years.

Whereas, the Indians have expressed a strong desire to have some provision made for their half-breed relatives, therefore it is agreed that fifteen thousand (15,000) dollars shall be paid to said Indians, next year, as a present, to be disposed of as they together with their agent, shall determine in council.

Article 5. Whereas, the whole country between Lake Superior and the Mississippi has always been understood as belonging in common to the Chippewas, party to this treaty; and whereas, the bands bordering on Lake Superior have not been allowed to participate in the annuity payments of the treaty made with the Chippewas of the Mississippi, at St. Peters, July 29, 1837, and whereas all the unceded lands belonging to the aforesaid Indians are hereafter to be held in common, therefore, to remove all occasions for jealousy and discontent, it is agreed that

all the annuity due by said treaty as also the annuity due by the present treaty, shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share.

Article 6. The Indians residing on the Mineral district shall be subject to removal therefrom at the pleasure of the President of the United States.

Article 7. This treaty shall be obligatory upon the contracting parties when ratified by the President and Senate of the United States.

Proclaimed March 28, 1843.

VI.

That in compliance with Article 4 of said treaty, the United States paid the consideration for said lands so ceded, in strict accordance with the stipulations therein contained, to-wit: an aggregate sum of money and merchandise amounting to eight hundred and sixty thousand dollars, and all the title of said Indians in and to said lands was thereupon and thereby extinguished except a mere temporary right of occupancy. That the lands so ceded by said treaty embraced all of the lands hereinafter described, the title to which is claimed by the State of Wisconsin.

VII.

That by the terms of the treaty aforesaid the said Chippewa Indians released to the United States prior to the passage of the enabling act of congress aforesaid and to the adoption of the constitution of the State of Wisconsin and to the acceptance of the school land grant therein contained by said State, all of their claim of title

or interest in or to said lands and each and every part thereof, and ceded the same to the United States which thereupon became the absolute owner thereof free from any claim of said Indians, and the State of Wisconsin upon its admission to the Union as aforesaid, became vested with an absolute right in and to all the sections sixteen, within said territory, subsequently surveyed by the United States, with the right in said State to have any temporary possession or occupancy of the Indians aforesaid terminated by the United States.

VIII.

That at and prior to the making of the treaty of 1843 hereinbefore set out, the said Chippewa Indians claimed ownership and right of occupancy in large body of lands in what is now the State of Minnesota, including the lands particularly described in Article 2 of the treaty of September 20th, 1854, hereinafter set out in full. That under the terms of Article 2 of said treaty of 1843 it was contemplated that all of the Chippewa Indians scattered over the territory ceded to the United States by said treaty, should be removed and permanently located on their lands aforesaid within the boundaries of the present State of Minnesota, but that some of the bands and members of said tribe not wishing to be so removed procured the United States to enter into the farther and additional treaty with them on the 30th day of September, 1854, for the cession of certain of their lands within the boundaries of the present State of Minnesota in consideration among other things of the reservation to them of certain lands embraced within their cession in the said treaty of 1843, of which treaty of 1854 the following is a copy:

FRANKLIN PIERCE, President of the United States of America, to all and singular to whom these presents shall come, greeting:

WHEREAS, a treaty was made and concluded at LaPointe, in the State of Wisconsin, on the thirtieth day of September, eighteen hundred and fifty-four, by Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men, which treaty is in the words following, to-wit:

Articles of a treaty made and concluded at LaPointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and head-men.

Article 1. The Chippewas of Lake Superior hereby cede to the United States all the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary line, to-wit: Beginning at a point where the east branch of Snake River crosses the southern boundary-line of the Chippewa Country, running thence up the said branch to its source, thence nearly north, in a straight line, to the mouth of East Savannah River, thence up the St. Louis River to the mouth of East Swan River, thence up the East Swan River to its source, thence in a straight line to the most westerly bend of Vermillion River, and thence down the Vermillion River to its mouth.

The Chippewas of the Mississippi hereby consent and agree to the foregoing cession, and consent that the whole amount of the consideration money for the country ceded

above shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi all their interest in and claims to the lands heretofore owned by them in common, lying west of the above boundary line.

Article 2. The United States agrees *to set apart and withhold from sale*, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz.:

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan, township fifty-one north, range thirty-three west; township fifty-one north, range thirty-two west; the east half of township fifty north, range thirty-three west; the west half of township fifty north, range thirty-two west; and all of township fifty-one north, range thirty-one west, lying west of Huron Bay.

2d. For the LaPointe band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the center of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of township forty-six north, range two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground.

3. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

4th. For the Fond du Lac bands, a tract of land bounded as follows: Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary line heretofore described, thence north along said boundary line to the mouth of the Savannah River, thence down the St. Louis River to the place of beginning. And if said tract shall contain less than one hundred thousand acres, a strip of land shall be added on the south side thereof large enough to equal such deficiency.

5th. For the Grand Portage band, a tract of land bounded as follows: Beginning at a rock a little east of the eastern extremity of Grand Portage Bay, running thence along the lake shore to the mouth of a small stream called by the Indians Maw-ske-gwaw-caw-maw-se-be, or Cranberry Marsh River, thence up said stream, across the point to Pigeon River, thence down Pigeon River to a point opposite the starting point, and thence across to the place of beginning.

6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief may each select, on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in

the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

7th. Each head of a family, or a single person over twenty-one years of age at the present time, of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

Article 3. The United States will define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or a single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right-

of-way through the same, compensation being made therefor as in other cases.

Article 4. In consideration of and payment for the country hereby ceded, the United States agrees to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to-wit: Five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in agricultural implements and cattle, carpenter's and other tools, and building materials, and three thousand dollars for moral and educational purposes, of which last sum three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also, the further sum of six thousand dollars in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready made clothing, to be distributed among the young men of the nation at the next annuity payment.

Article 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much longer as the President may think proper, at each of the points herein set apart for the residence of the Indians, the same to be in lieu of all the employes to

which the Chippewas of Lake Superior may be entitled under the previous existing treaties.

Articles 6. The annuities of the Indians shall not be taken to pay the debts of individuals, but satisfaction for the depredations committed by them shall be made by them in such manner as the President may direct.

Article 7. No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the residence of the Indians, and the sale of the same shall be prohibited on the territory hereby ceded, until otherwise ordered by the President.

Article 8. It is agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi that the former shall be entitled to two-thirds, and the latter to one-third, of all benefits to be derived from former treaties existing prior to the year 1847.

Article 9. The United States agree that an examination shall be made and all sums that may be found equitably due to the Indians, for arrearages of annuity or other thing, under the provisions of former treaties, shall be paid as the chiefs may direct.

Article 10. All missionaries, and teachers, and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed, to the amount of one-quarter section each.

Article 11. All annuity payments to the Chippewas of Lake Superior shall hereafter be made at L'Anse, LaPointe, Grand Portage, and on the St. Louis River;

and the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded shall have the right to hunt and fish therein, until otherwise ordered by the President.

Article 12. In consideration of the poverty of the Bois Forte Indians, who are parties to this treaty, they having never received any annuity payments, and of the great extent of that part of the ceded country owned exclusively by them, the following additional stipulations are made for their benefit. The United States will pay the sum of ten thousand dollars, as their chiefs in open council may direct, to enable them to meet their present just engagements. Also, the further sum of one thousand dollars, in five equal annual payments in blankets, cloth, nets, guns, ammunition and such other articles of necessity as they may require.

They shall have the right to select their reservation at any time hereafter under the direction of the President; and the same may be equal in extent, in proportion to their numbers, to those allowed the other bands, and be subject to the same provisions.

They shall be allowed a blacksmith, and the usual smith-shop supplies, and also two persons to instruct them in farming, whenever in the opinion of the President it shall be proper, and for such length of time as he shall direct.

It is understood that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as the Chippewas of Lake Superior; *Provided*, That the stipulation by which the Chippewas of Lake Superior relinquishing their right to land west

of the boundary-line shall not apply to the Bois Forte band, who are parties to this treaty.

Article 13. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

Proclaimed January 29, 1855.

That all of the lands described in Article 1 of said last named treaty and ceded thereby to the United States lie within the boundaries of the present State of Minnesota, and constitute no part of the land embraced in the treaty of March 28, 1843, hereinbefore set forth.

IX.

That all of the lands described in Subdivision 2 of Article 2 of said treaty of 1854 and therein agreed to be set apart and withheld from sale for the LaPointe band of said Chippewa Indians and all of the tracts of land referred to in the 3d Subdivision of Article 2 of said last named treaty lying about Lac Du Flambeau and on Lac Court Oreilles, the boundaries of which were thereafter agreed upon between the United States and said bands of Indians under the direction of the President, as hereinafter more particularly stated, were included and embraced in the lands ceded to the United States by said treaty of 1843, and were lands in which the State of Wisconsin had, under the enabling act and state constitution aforesaid, become entitled to every sixteenth section thereof.

X.

That the lands described in Subdivision 2 of Article 2 of said treaty of 1854, embraced all of township 46 and 47 north, ranges 2 and 3 west, and portions of town-

ship 48 north, range 3 west, including section 16 as afterwards surveyed, and a portion of township 47 north, range 1 west, including section 16 therein, as afterwards surveyed:

That in the year 1847, the east line of township numbered 46 north, of range 2 west, and the west line of township number 47 north, range 1 west, were duly surveyed by the United States; that in the year 1852, all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times thereafter in the years 1856, 1858 and 1873.

XI.

That for the purpose of setting apart a tract of land lying about Lac Du Flambeau for other Wisconsin bands of said Indians mentioned in Subdivision 3 of Article 2 of said treaty, surveys were made under the direction of the United States as follows: In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860, the east line of said towns 40 and 41-4 east; and in September, 1861, the south, east and west lines of towns 40 and 41-5 east; and in August, 1864, the south and west lines of townships 40 and 41-4 east; and in July, 1865, each of said townships was subdivided by such surveys, into sections.

That on June 22, 1866, all of the lands now claimed to be within the reservation of said Wisconsin bands about Lac Du Flambeau and covered by said Subdivision

3 of Article 2 aforesaid, were, by order of W. T. Otto, Acting Secretary of the Interior of the United States, withdrawn from sale until such time as the boundaries of the reservation contemplated by said treaty should be fully defined.

That no further and later action appears to have been taken by the United States in regard to said Lac Du Flambeau reservation, and said reservation has been hitherto held and claimed by said Wisconsin bands of said tribe under the terms of said order of June 26, 1866; that annexed hereto is a copy of all of the executive orders made in regard to said last named reservation, which copy is marked Exhibit "A," and made a part of this bill.

XII.

That pursuant to the provisions of Subdivision 3 of Article 2 aforesaid for the withdrawal and setting apart of three townships of land about Lac Court Oreilles for other Wisconsin bands of said Chippewa Indians, certain lands in townships 39 north, ranges 7 and 9 west, and township 40 north, ranges 6, 7 and 8 west, were, by orders from the General Land Office of the United States, dated November 22, 1859, and April 4, 1865, withdrawn from market from which to select a permanent reservation for said bands of Indians, and by order of C. Delano, Secretary of the Interior of the United States, dated March 1, 1873, a permanent reservation for the Lac Court Oreilles bands of Chippewa Indians was fixed and determined, but in the selection of said lands and the fixing of such permanent reservation, all sections 16 therein were excluded; that annexed hereto is a copy of the several executive orders fixing the boundaries and limits

of said Lac Court Oreilles reservation, which copy is marked Exhibit "B," and made a part of this bill.

XIII.

That neither the boundaries nor the description of the lands to be embraced in the aforesaid Lac Du Flambeau and Lac Court Oreilles reservations were fixed or determined by the United States until after the lands embraced within such reservations had been surveyed and subdivided into sections and until after the title to sections 16 within such reservations had absolutely vested in the State of Wisconsin under the facts hereinbefore stated.

That a plat of said lands to be reserved under said treaty of 1854 to said La Pointe bands of Indians is hereto annexed, marked Exhibit "C," and made a part of this bill; that a plat of the lands withdrawn from sale and set apart for said Lac Du Flambeau Indians is hereto annexed, marked Exhibit "D," and made a part of this bill.

XIV.

That in and by the terms of Article 3 of said treaty of 1854, the power was expressly reserved to the United States to make changes in the boundaries of the tracts so reserved for said several bands of Indians or otherwise as might be necessary to prevent interference with any vested rights, and the United States exercised said power in excluding said sections 16 from said Lac Court Oreilles reservation, but omitted to exercise the same power as to said La Pointe and Lac Du Flambeau reservations.

XV.

That under the enabling act of congress aforesaid, and under the said state constitution, and under and in view of the cession of their lands by said Chippewa Indians contained in said treaty of 1843, all of the lands surveyed and to be surveyed as sections 16 of the various townships within the territory covered by said treaty vested in the State of Wisconsin, and said State of Wisconsin has at all times heretofore since its admission to the Union claimed a right to the fee of all lands in sections 16 in the several townships within said reservations and since the sectional survey thereof by the United States has claimed the actual fee in said sections and has exercised dominion and ownership over the same and has issued sundry and divers patents to divers persons and corporations for portions thereof, sundry of which persons and corporations, grantees of the State as aforesaid, have also exercised acts of ownership thereof and have paid taxes and made improvements thereon, and have cut and hauled timber therefrom until forbidden by orders of the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, as hereinafter more particularly mentioned. That patents for all of said sections 16 within said La Pointe reservation have heretofore been issued by said State to divers parties; and patents upon about fourteen forties of said sections 16 within said Lac Du Flambeau reservation have been issued by said State to divers parties and there still remain about twenty-nine forties in said sections 16 within said Lac Du Flambeau reservation, the title to which is still in and claimed by said State.

XVI.

That under the treaty of 1854 aforesaid and in carrying out its provisions, the said Secretary of the Interior has proceeded, through the United States Indian Department, to allot from time to time to the various members of said tribes of La Pointe bands of Indians and to various members of the Wisconsin bands on said Lac Du Flambeau reservation eighty acres per capita of lands within said reservations and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States, and have terminated their tribal relations, and have ceased to occupy any material part of said reservation in common.

That the lands within said reservations exclusive of the lands in sections 16, are sufficient to secure eighty acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of Indians of any land embraced within any of said Sections 16.

XVIII.

That beginning about the year 1899, and from thence hitherto, the defendant, Ethan Allen Hitchcock, as Secretary of the Interior, and the Commissioner of the Indian Office of the United States, and divers agents and servants under them, have set up on behalf of said La Pointe and other bands of Indians, or the members

thereof, a claim of interest or title in and to sections 16 aforesaid in the reservation townships aforesaid, paramount and adverse to the title of the State of Wisconsin, and have claimed and continue to claim that said sections 16 are still held by the United States in trust for said Indians to the same extent as other lands in said reserved townships, and have forbidden purchasers of such lands holding patents from the State to enter or make improvements or cut any timber thereon, and have thereby cast a cloud upon the title of the State and its grantees to said lands, and have interfered with, and are continuing to interfere with the use and enjoyment of the same by the owners thereof.

XIX.

That said lands so in dispute between the complainant, State of Wisconsin, and the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, acting on behalf of said Indians, amount in the aggregate to about fifty-seven hundred and sixty (5760) acres of a market value of over fifty thousand (50,000) dollars. That by Chap. 95 of the Laws of the State of Wisconsin for the year 1903, approved April 20, 1903, the Attorney General of the State of Wisconsin was duly authorized to institute proceedings in this Court under the provisions of the act of Congress passed March 2, 1901, and hereinbefore referred to, to determine the rights of said State to what are commonly known as school lands, within any reservation or Indian cession within said State, where any Indian tribe claims any right to or interest in said lands, or to the disposition

thereof by the United States, and particularly to determine the title of the lands embraced within sections sixteen in the several townships constituting the present Bad River or La Pointe, and the Flambeau Indian reservations within said State.

In consideration whereof, and for as much as your orator is remediless in the premises, and can have no adequate relief except in this Court; and to the end therefore, that the defendant may, if he can, show why your orator should not have the relief prayed, and to the end that the defendant may make full, true, direct and perfect answer to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived; and to the end that the title of your orator to the lands hereinbefore described and referred to, and that the title to said lands be decreed to be in your orator, and to the end that the defendant, his officers, servants and employes, and the officers, servants and employes of the said department of which he is the official head, be restrained by injunction issuing out of this Court, from in any manner interfering with the use, possession or enjoyment of any part of said lands, or of interfering with the exercise of your orator, or its grantees, of acts of ownership of said lands.

May it please Your Honors to grant unto your orator not only a writ of injunction, conformably to the prayer of this bill, by a writ of subpoena issuing out of, and under the seal of this Honorable Court, directed to the defendant, Ethan Allen Hitchcock, Secretary of the Interior of the United States, commanding him under a certain penalty to be therein inserted, on a day certain to be and appear and answer (but not under oath) to

this bill of complaint, and to further stand to and abide such order and decree as shall be made herein agreeably to equity and good conscience.

And your orator will ever pray.

L. M. STURDEVANT,
Attorney General of Wisconsin.

T. W. SPENCE,
Of Counsel for State of Wisconsin.

UNITED STATES OF AMERICA,
STATE OF WISCONSIN, } ss.
COUNTY OF DANE.

Personally appeared before me the undersigned, L. M. Sturdevant, who being sworn in the foregoing cause, on oath, says he is the Attorney General of the State of Wisconsin, and as such directed the filing of the foregoing bill. That all of the facts set forth in said bill are true to the best of his knowledge, information and belief.

L. M. Sturdevant

Sworn to and subscribed before me this
21st day of February, A. D. 1905.

R. E. Smith
Notary Public
Wis.

EXHIBIT "A."

Lac De Flambeau Reserve.

[Area 52½ square miles; treaty September 30, 1854; act of May 29, 1872 (17 Stat. 190).]

DEPARTMENT OF THE INTERIOR,
Office Indian Affairs, June 22, 1866.

SIR: Provision is made in the third section of the second article of the treaty of September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, for setting apart and withholding from sale a tract of land lying about Lac De Flambeau, "equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed by the President." (U. S. Statutes at Large, vol. 10, p. 1109.)

As the lands adjoining this lake are about to be offered at public sale, it is important that immediate action should be taken in withdrawing from sale lands necessary for this reservation. The following-described lands were included within a survey made to define the boundaries of this reservation in June, 1863, by A. C. Stunz, surveyor, under the direction of the Superintendent of Indian Affairs, viz.: Sections 5 and 6, township 39 north, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 40 north, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 41 north, range 6 east; all of township 41 north, range 5 east; sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, township 41 north, range 4 east; sections 1, 2, 11, 12, 13 and 14, township 40 north, range 4 east; sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18; township 40 north, range 5 east; the area of the same being 55,630.26 acres.

As this is a less amount of land than is provided for in the treaty for said reservation, I would respectfully recommend that in addition to the foregoing there be reserved from sale, until such time as the boundaries of the reservation are fully defined, the following described lands which are contiguous to those included in the survey above stated, viz.: Sections, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36, township 40 north, range 5 east; sections 3, 10, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36, township 40 north, range 4 east.

Very respectfully, your obedient servant,

D. N. COOLEY,
Commissioner.

HON. JAMES HARLAN,
Secretary of the Interior.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE.
Washington, June 27, 1866.

SIR: I have received your letter of the 26th instant inclosing a copy of a letter from the Commissioner of Indian Affairs, dated the 22d, requesting the withholding from sale of certain lands on account of the Lac De Flambeau band of Chippewas, under third section, second article, of the treaty of September 30, 1854.

In compliance with your instructions the necessary entries have been made in the records of this office, and the register and receiver at Stevens Point, Wis., have this day been directed to withhold from sale the land described in the Commissioner's letter. A copy of my letter is inclosed herewith.

Very respectfully, your obedient servant,

JOS. S. WILSON,
Acting Commissioner.

HON. JAMES HARLAN,
Secretary of the Interior.

[Inclosure.]

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE.

Washington, June 27, 1866.

GENTLEMEN: In pursuance of the order of the Secretary of the Interior of the 26th instant, the following-described lands will be withheld from settlement or sale on account of the Lac De Flambeau band of Chippewa Indians, to-wit: Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36, township 40, range 4 east; sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, township 41, range 4 east; all of township 40, range 5 east; all of township 41, range 5 east; sections 5 and 6, township 39, range 6 east; sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 40, range 6 east; and sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, township 41, range 6 east.

These lands will be held in reservation for the purpose mentioned, and consequently will not be subject to settlement or sale, and you will so enter them on your plats and tract- books, and advise me when that has been done.

JOS. S. WILSON,
Acting Commissioner.

REGISTER AND RECEIVER,
Stevens Point, Wis.

DEPARTMENT OF THE INTERIOR,
Washington, D. C., June 28, 1866.

SIR: For your information I inclose herewith copy of letter of the Commissioner of the General Land Office, transmitting to this Department copy of the order of withdrawal from public sale of certain lands in the

vicinity of Lac De Flambeau, Wis., as directed by my letter of the 26th instant.

Very respectfully, your obedient servant,

JAS. HARLAN,

HON. D. N. COOLEY, *Secretary.*

Commissioner of Indian Affairs.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

June 27, 1866.

Register and Receiver, Stevens Point, Wis.:

GENTLEMEN:

In pursuance of the order of the Secretary of the Interior of the 26th inst., the following described lands will be withheld from settlement or sale on account of the Lac De Flambeau band of Chippewas, to-wit:

Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23, 24, 25, 26, 27, 34, 35 and 36, *Town 40, R. 4 E.* Sections 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, *Town 41, R. 4 E.*

All of Town 40, R. 5 E.

All of Town 41, R. 5 E.

Sections 5 and 6, *Town 39, R. 6 E.*

Sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, *Town 40, R. 6 E.*, and Sections 5, 6, 7, 8, 17, 18, 19, 20, 29, 30, 31 and 32, *Town 41, R. 6 E.*

These lands will be held in reservation for the purpose mentioned, and consequently will not be subject to settlement or sale, and you will so enter them on your plats and tract books, and advise me when that has been done.

Very respectfully, etc.,

JOS. S. WILSON,

Actg. Commissioner.

EXHIBIT "B."

Lac Court Oreilles Reserve.

WASHINGTON, D. C., February 17, 1873.

SIR: I have the honor to inclose herewith, in accordance with your instructions dated December 18, 1872, a list of the lands selected as a permanent reservation for the Lac Court Oreille bands, Chippewas of Lake Superior, after consultation with the chiefs and headmen.

It is believed that the above-mentioned selection, while satisfactory to the Indians and fulfilling the spirit of the treaty which it is made, fully secures the interests of the General Government, as well as those of the State of Wisconsin.

It is of the greatest importance that a survey of the exterior boundaries of the reservation be made at the earliest practicable period. The boundary marks of the first survey are generally indistinct, and, besides, do not conform to the boundaries as now proposed.

Persons may trespass with little danger of discovery or hindrance now, but would be prevented if the boundaries of the reservation were distinctly defined and marked so that the Indians themselves could understand them.

Very respectfully, your obedient servant,

S. N. CLARK,

United States Indian Agent.

HON. H. R. CLUM,

Acting Commissioner of Indian Affairs,

Washington, D. C.

DEPARTMENT OF THE INTERIOR,

Office of Indian Affairs, February 24, 1873.

SIR: I have the honor to submit herewith the follow-

ing selections of land for a permanent reservation for the Lac Court Oreilles bands of Chippewas, of Lake Superior, as recommended in a report to this office from Agent S. N. Clark, under date of the 17th instant, pursuant to instructions of December 18, 1872, amounting in the aggregate to 69,136.41 acres, viz.:

Description	Section	Township	Range	Area
				Acres
SE. ¼ and NE. ¼	3	40	6	266.97
E. ½ and SE. ¼	8	40	6	80.00
W. ¼ of SW. ¼, S. ½ of NE. ¼ and S. ½ of NW. ¼	9	40	6	200.00
NW. ¼ of NE. ¼, and NW ¼	10	40	6	200.00
E. ½ of NE. ¼, E. ½ of SE. ¼ and SE. ¼ of SW. ¼ or lot 1	17	40	6	198.26
SE. ¼	18	40	6	160.00
NE. ¼	19	40	6	166.90
All	20	40	6	579.68
NW. ¼ of NW. ¼	21	40	6	40.00
Lot No. 1	27	40	6	62.36
Lots 2 and 3	28	40	6	96 40
SW. ¼ of SE. ¼ (lot 5) and SW. ¼ (lots 1, 6, and 7)	28	40	6	165.24
All	29	40	6	480.77
S. ½	30	40	6	248.24
All	31	40	6	439.03
NW. ¼ (lots 1, 2, and 3) and N. ½ of NE. ¼	32	40	6	193.95
All	33	40	6	562.03
All	34	40	6	584 21
SW. ¼ of SW. ¼, (lots 1 and 2)	35	40	6	38.07
Total in township				4,725.21
S. ½, (lots 1, 2, 3, 4, and 5)	26	40	7	200.35
SE. ¼, (lots 1 and 2)	27	40	7	131.60
E. ½	34	40	7	284 59
All	35	40	7	457.88
Part of SE ¼ (lots 2 and 3) and SE. ¼ of SW. ¼ (lot 4)	36	40	7	119.75
Total in township				1,194.17
All	1	40	8	422.98
All	2	40	8	480.62
E. ½, E. ½ of SW. ¼ and NW. ¼ (lots 2 and 3)	6	39	7	470.96
All	7	39	7	613.04
W. ½, lots 1, 2, 3, and SW. ¼ of SE. ¼	8	39	7	534.83
All	9	39	7	534.70
All	4	40	8	537.80
All	5	40	8	532.00
All	6	40	8	453.62
All	7	40	8	554.77
All	8	40	8	603 08
All	9	40	8	640.00
All	10	40	8	640.00
All	11	40	8	640.00
All	12	40	8	640.00
All	13	40	8	640 00
All	14	40	8	640.00
All	15	40	8	640.00
All	17	40	8	445.33
All	18	40	8	186 88
All	19	40	8	1.70
All	20	40	8	165.06
All	21	40	8	606.25
All	22	40	8	608.30
All	23	40	8	594.60
S. ½, NW. ¼, S. ½ of NE ¼ and NW. ¼ of NE. ¼	24	40	8	600.00
All	25	40	8	639.99
All	26	40	8	640.00
All	27	40	8	635.10
All	28	40	8	442 55
All	29	40	8	507.18
All	30	40	8	462.78
All	31	40	8	380.69
All	32	40	8	132.64
All	33	40	8	557.55
All	34	40	8	640.00
All	35	40	8	640.00
All	36	40	8	520.95
Total in township				18.007.12
All	1	39	7	630 05
All	2	39	7	641.78
N. ½, of NE. ¼, S. ½ of SE ¼ and NE. ¼ of SE. ¼	3	39	7	200.66
All	4	39	7	601.67
All	5	39	7	632.38
All	23	39	8	618.20
All	24	39	8	583.15
All	25	39	8	640.00
All	26	39	8	398.20
All	27	39	8	599.59
All	28	39	8	640.00
All	29	39	8	640.00
All	30	39	8	637.86

Description	Section	Township	Range	Area
				Acres
NE. ¼ of NE. ¼, lots 1, 2, 3, 4, 5, and 6, and SE. ¼ of SE. ¼	9	39	7	315.01
S. ½, NE. ¼, S. ½ of NW. ¼ and NE. ¼ of NW. ¼	10	39	7	600.00
All	11	39	7	640.00
All	12	39	7	640.00
All	13	39	7	640.00
All	14	39	7	640.00
All	15	39	7	640.00
W. ½, SE. ¼, W. ½, NE. ¼ and SE. ¼ of NE. ¼	17	39	7	600.00
All	18	39	7	609.76
All	19	39	7	611.76
All	20	39	7	640.00
All	21	39	7	640.00
All	28	39	7	640.00
All	29	39	7	640.00
N. ½, NE. ¼ of SW. ¼, N. ½ of SE. ¼ and SE. ¼ of SE. ¼ E. ½, SW. ¼, W. ½ of NW. ¼ and SE. ¼ of NW. ¼	30	39	7	467.46
All	31	39	7	574.00
All	32	39	7	640.00
All	33	39	7	640.00
Total in township	....	....	....	15,143.36
All	1	39	8	573.77
All	2	39	8	625.58
All	3	39	8	618.90
All	4	39	8	617.88
All	5	39	8	401.37
All	6	39	8	118.87
All	7	39	8	594.75
All	8	39	8	520.10
All	9	39	8	640.00
All	10	39	8	640.00
All	11	39	8	640.00
All	12	39	8	640.00
All	13	39	8	640.00
All	14	39	8	640.00
All	15	39	8	640.00
All	17	39	8	640.00
NW. ¼, N. ½ of SW. ¼, N. ½ of SE. ¼ and SE. ¼ of SE. ¼ S. ½, NE. ¼, SE. ¼ of NW. ¼ and W. ½ of NW. ¼	18	39	8	352.22
All	19	39	8	592.28
All	20	39	8	640.00
All	21	39	8	640.00
All	22	39	8	640 00

Description	Section	Township	Range	Area
				Acres
S. ½, NW. ¼, S. ½ of NE. ¼, NW. ¼ of NE. ¼	31	39	8	595.88
All	32	39	8	640.00
All	33	39	8	640.00
All	34	39	8	640.00
All	35	39	8	636.00
All	36	39	8	640.00
Total in township	....	....	....	20,604.60
All	4	38	8	738.92
All	5	38	8	761.30
All	6	38	8	780.49
All	7	38	8	683.50
All	8	38	8	640.00
S. ¼, NE. ¼, E ½ of NW. ¼ and SW. ¼ of NW. ¼	9	38	8	600.00
All	17	38	8	640.00
All	18	38	8	627.88
Total in township	....	....	....	5,422.09
All	1	38	9	791.26
All	12	38	9	640.00
All	13	38	9	640.00
Total in township	....	....	....	2,071.26
Lot 2	1	39	9	48.60
All	24	39	9	640.00
All	25	39	9	640.00
All	36	39	9	640.00
Total in township	....	....	....	1,968.80

SUMMARY.

Withdrawn Nov. 22, 1859	40	6	4,725.21
Do	40	7	1,194.17
Do	40	8	18,007.12
Do	39	7	15,143.36
Do	39	8	20,604.60
Do	38	8	5,422.09
Withdrawn April 4, 1865	38	9	2,071.26
Do	39	9	1,968.60
Aggregate withdrawn	....	....	69,136.41

I now respectfully recommend that the remainder of lands withdrawn from market by orders from the General Land Office of November 22, 1859, and April 4, 1865, from which to select a permanent reservation for said Indians, be restored to market.

Very respectfully, your obedient servant,

H. R. CLUM,
Acting Commissioner.

The HON. SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR, March 1, 1873.

SIR: I transmit herewith copy of a letter from the Acting Commissioner of Indian Affairs, dated the 24th ultimo, submitting selections of land for a permanent reservation for the Lac Court Oreilles band of Chippewa Indians of Lake Superior, amounting in the aggregate to 69,136.41 acres.

The recommendation of the Acting Commissioner that the remainder of lands withdrawn from market by orders from the General Land Office of November 22, 1859, and April 4, 1865, from which to select a permanent reservation for said Indians, be restored to market, is hereby approved, and you will be pleased to carry the same into effect.

Very respectfully, your obedient servant,

C. DELANO,
Secretary.

The Commissioner of the General Land Office.

EXHIBIT "C."

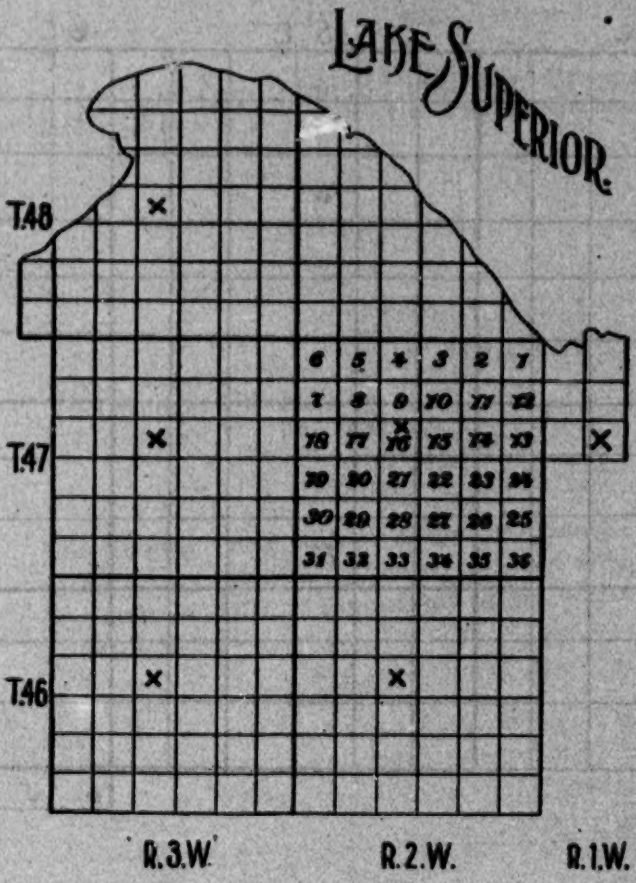
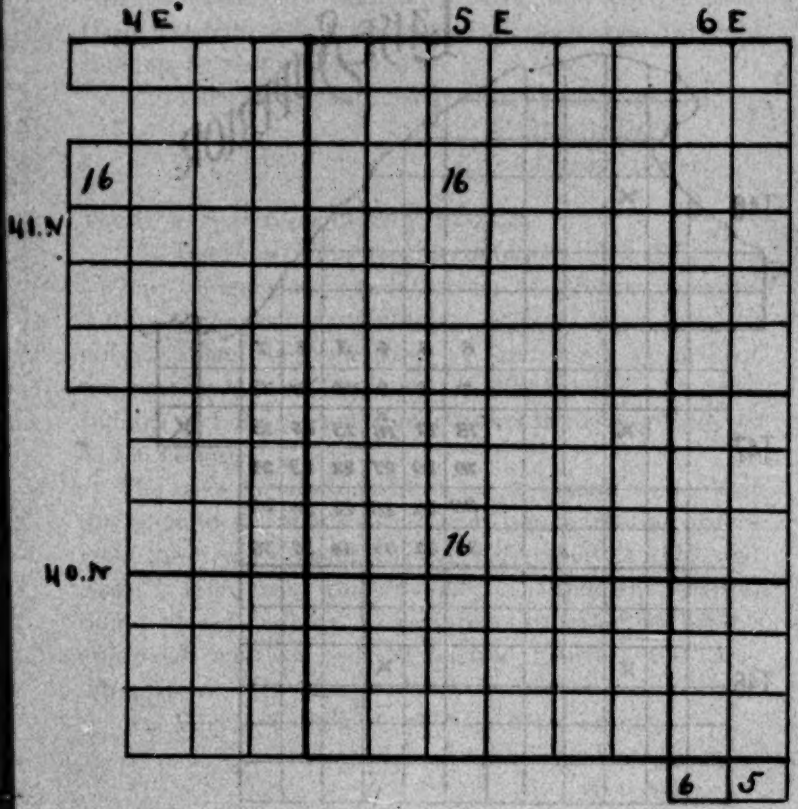
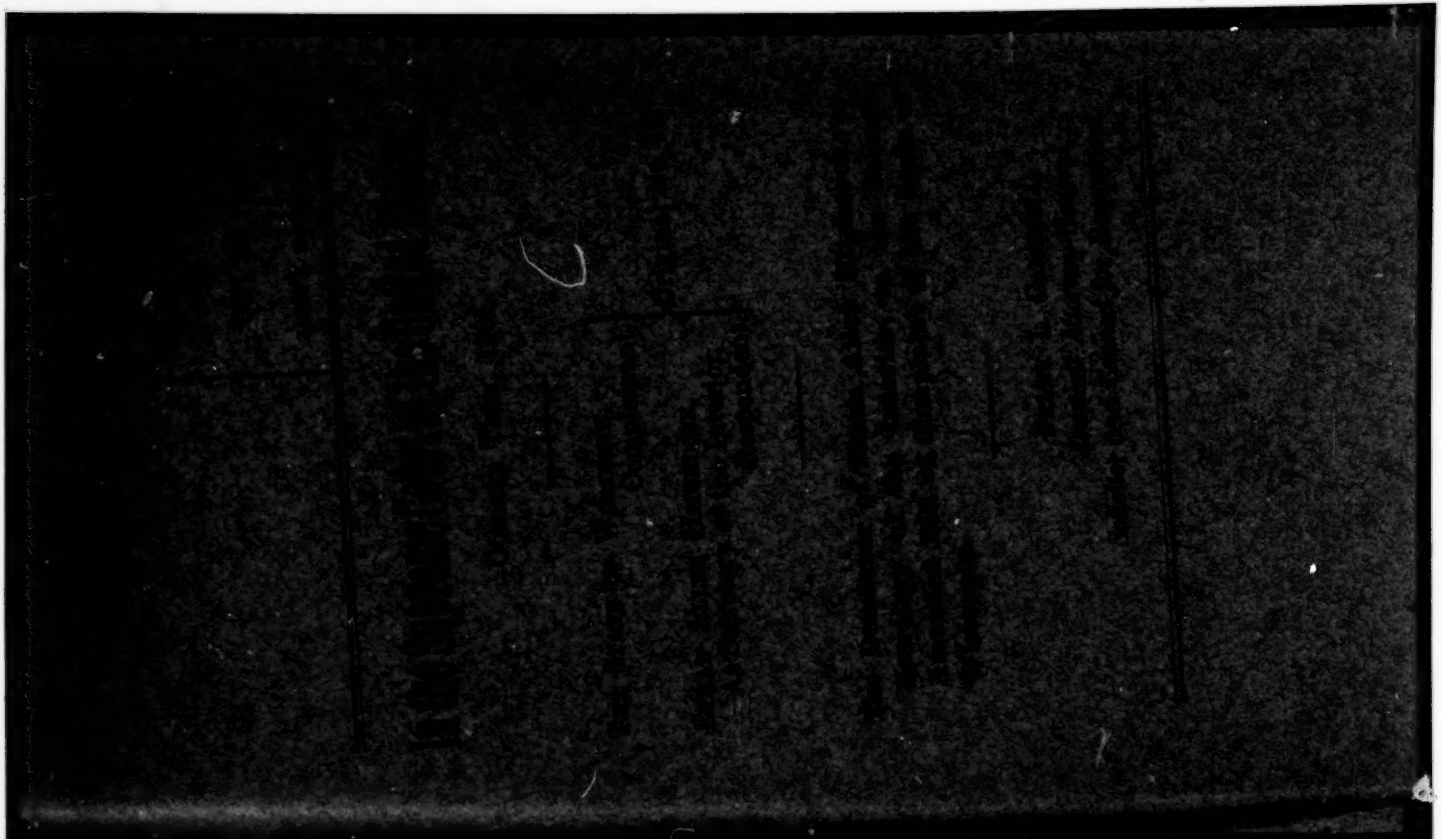


EXHIBIT "D."





In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE STATE OF WISCONSIN,
Complainant,
v.
ETHAN ALLEN HITCHCOCK,
As Secretary of the Interior,
Respondent.
} Original No. 12.

The Demurrer of Ethan Allen Hitchcock, as Secretary of the Interior, Respondent, to the Second Amended Bill of Complaint of the State of Wisconsin, Complainant.

This respondent, Ethan Allen Hitchcock, as Secretary of the Interior, not confessing all or any of the matters and things in the complainant's bill of complaint contained therein to be true, in such manner and form as the same is therein set forth and alleged, does demur to said bill, and for cause of demurrer shows:

First: That the said complainant has not in and by its said bill of complaint shown any claim of

right, title, or interest whatsoever in or to the premises, or any part thereof, mentioned or described in said bill of complaint, or any acts or things done or threatened by respondent, which entitles said complainant to the relief prayed for by it in its said bill of complaint or any of said relief, or any relief whatever against respondent.

Second: That said complainant has not, in and by its said bill of complaint, made or stated such a case as does or ought to entitle it to any such relief as is thereby sought and prayed for, from or against this respondent.

Third: That said bill of complaint does not set forth or show that the complainant has any interest or title in or to the premises described in said bill of complaint, or any part thereof.

Fourth: That the said bill of complaint does not contain any matter of equity whereon this Court can ground a decree, or give to the complainant any relief against this respondent.

Fifth: That in and by complainant's said bill of complaint it does appear that this Court has no jurisdiction over the subject-matter of the action.

Wherefore, the respondent humbly demands the judgment of this Court whether he shall be compelled to make any further or other answer to the

said bill of complaint and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

FRANK L. CAMPBELL,
Assistant Attorney-General,
Solicitor and Counsel for Respondent.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 12, Original.

STATE OF WISCONSIN

vs.

ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR.

BRIEF AND ARGUMENT FOR COMPLAINANT.

L. M. STURTEVANT,
Attorney General for Wisconsin.

T. W. SPENCE,
Of Counsel.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20388

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 12, Original.

STATE OF WISCONSIN

vs.

ETHAN ALLEN HITCHCOCK, SECRETARY OF THE INTERIOR.

BRIEF AND ARGUMENT FOR COMPLAINANT.

Statement of Facts.

This is a suit in equity brought by the State of Wisconsin to enjoin, conformably to act of Congress of March 2, 1901 (31 Stat., 950), the Secretary of the Interior of the United States from interfering with the use, possession, and enjoyment by the State of Wisconsin and its grantees of any part of sections 16 of the lands described in the bill and formerly included in territory of the Chippewa Indians in Wisconsin, and to decree the title of such lands to be in the State of Wisconsin.

The undisputed facts are set up in the amended original bill filed in this court, to which the defendant has filed its general demurrer, etc.

The State claims these lands as school lands; the Secretary of the Interior claims them, as the representative of the United States, on behalf of the La Pointe and other bands of the Chippewa Indians.

The solution of the question of title depends upon the force and effect of the acts of Congress for the admission of Wisconsin into the Union as a State; the grant to the State, in the organic act, of section sixteen of each township of public land for the use of schools, and the force and effect of certain treaties of the United States with the Chippewa Indians, one made in 1843, preceding the grant to the State, and the other in 1854, subsequent to the grant to the State.

Prior to March 28, 1843, almost the entire northern half of the territory of the present State of Wisconsin, including all the lands lying between Lake Superior on the north, Green bay and Fox river on the east, the latitude of Plover-Portage on the Wisconsin river on the south, and the Mississippi on the west, was *unceded* Chippewa Indian land. The tribe of Chippewa Indians were recognized as having two main divisions—*i. e.*, Chippewas of Lake Superior and Chippewas of the Mississippi—and consisting of a number of bands apparently designated by certain rendezvous, such as "L'Anse et Vieux de Sert," "Fond du Lac," "La Pointe," &c., bands.

On March 28, 1843, a treaty was concluded between the United States and both the Chippewas of Lake Superior and of the Mississippi, whereby said tribes, in consideration of a large sum of money and merchandise presently paid and large annuities to be thereafter paid, *ceded* to the United

States, without reservation or exception save as hereinafter stated, all their lands within the then Territory and thereafter State of Wisconsin, embracing what had constituted the more especial country of the Chippewas of Lake Superior. Provision was made therein for a division of the annuities under that treaty, as well as the annuities under a treaty of 1837 with the Chippewas of Mississippi, among the members of both branches of the tribe.

By article 2 of said treaty the Indians stipulated for the right of hunting on the ceded territory, with the other usual *privileges* of occupancy, until required to remove by the President of the United States

By article 3 of said treaty it is provided that all the *unceded* lands belonging to the Fond du Lac, Sandy Lake, and Mississippi bands should be *the common* property and *the home of all the Indians* parties to the treaty.

In article 5 of the treaty the right of all the Chippewa Indians of all branches and bands *to hold the* UNCEDED *lands in common* is recognized.

By section 7 of an act of Congress "to enable the people of Wisconsin Territory to form a constitution and State government, and for the admission of such State into the Union, approved August 6, 1846," it was enacted that certain propositions therein recited be submitted to the convention which should assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection, and if accepted by said convention and ratified by an article in such constitution to be obligatory on the United States, among which propositions was the following:

"That sections numbered 16 in every township of the public lands in said State, and where such section has been sold

or otherwise disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

On February 1, 1848, the constitutional convention of the people of said Territory adopted a constitution, thereafter ratified by vote of the people on the 2d day of March, 1848, in accordance with the aforesaid enabling act. By section 2 of article 2 of such constitution all the propositions of the enabling act of Congress aforesaid were accepted, ratified, and confirmed.

By an act of Congress of the United States approved March 29, 1848, the State of Wisconsin was admitted into the Union on an equal footing with the original States in all respects, with boundaries as described in said act, including all of the lands described in the bill of complaint herein.

On September 30, 1854, the United States made another treaty with both branches of the Chippewa Indians, in which *it promised* "to set apart and withhold from sale" six separately mentioned tracts or so-called tracts of lands for the use of different bands or groups of such Indians.

Subdivision 2 of article 2 of said treaty reads as follows:

"For the use of the La Pointe band and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior a few miles west of the Montreal river at the mouth of a creek called by the Indians 'Ke-che-se-be-we-she;' running thence south to a line drawn east and west through the center of township 47 north; thence west to the west line of said township; thence south to the southeast corner of township 46 north, range 2 west; thence west the width of two townships; thence north the width of two townships; thence west one

mile; thence north to the lake shore and thence along the lake shore, crossing Shag-waw-me-quon point, to the place of beginning."

And also two hundred acres on the northern extremity of the Madeline island for a fishing ground.

By subdivision 3 of said article 2 there was to be set apart and withheld from sale "for the other Wisconsin bands a tract of land lying about Lac du Flambeau, and another tract on Lac Court Orielles, each *equal in extent* to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President."

The lands above and in subdivisions 2 and 3 of said treaty mentioned all lie within the territory ceded to the United States by the Indians in 1843.

The sections 16 involved in this case as to one group lie within the outer boundaries of the land agreed to be set apart for the La Pointe band, under the treaty of 1854, and as to the other within the Lac du Flambeau reservation made in 1866, under said treaty of 1854.

Article 3 of said treaty provides that the United States shall define the boundaries of the reserved tracts, whenever it might be necessary, by actual survey, and that the President may from time to time, at his discretion, cause the whole to be surveyed, and assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use, and at his discretion, as fast as the occupants became capable of transacting their own affairs, *issue patents to such occupants*, with such restriction of the power of alienation as he may see fit to impose, and make

rules respecting *the disposition of the lands* in case of the death of the head of the family or single person occupying the same or in case of abandonment by them. The President was also given authority by said article 3 to assign other lands in exchange for mineral lands, if any such were found in the tracts set apart, and was also given power to "*make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights.*"

Subdivision 7 of article 2 of the treaty of 1854 provides that "each head of a family or a single person over twenty-one years of age at the present time, of the mixed blood, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form."

The other articles of said treaty provided for additional payments to the Chippewas of Lake Superior for the lands ceded thereby, and prescribed sundry regulations of the conduct of the Indians on the lands set apart, and for the distribution of annuities, etc.

All of the lands mentioned in subdivisions 2 and 3 of article 2 of said treaty of 1854 to be set apart by the United States for the several bands of Chippewa Indians were included and embraced in the lands ceded to the United States by the treaty of 1843, and were lands in which the State of Wisconsin had, under the enabling act and State constitution, become entitled to every sixteenth section.

The lands described in subdivision 2 of article 2 of said treaty of 1854 to be set apart to the La Pointe band embraced

in their general outline townships 46 and 47 north of ranges 2 and 3 west and portions of township 48 north, range 3 west, including section 16, and a portion of township 47 north, range 1 west, including section 16.

In the year 1847 the east line of township 46 north, range 2 west, and the west line of township 47 north of range 1 west were duly surveyed by the United States. In 1852 all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west, and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times in the years 1856, 1858, and 1873.

Of the lands claimed to be within the Flambeau Indian reservation surveys were made under the direction of the United States as follows: In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860, the east line of towns 40 and 41, 4 east; in September, 1861, the south, east, and west lines of towns 40 and 41, 5 east; in August, 1864, the south and west lines of townships 40 and 41, 4 east, *and in July, 1865*, each of said townships was subdivided by survey into sections. On June 27, *1866*, the lands now claimed to be within the reservation of said Wisconsin bands about Lac du Flambeau were, by orders of the Commissioner of the General Land Office and of the Secretary of the Interior, withdrawn from sale, to be held in reservation for the purposes contemplated by said treaty. No further or later action was taken by the United States in regard to said Lac du Flambeau reservation, and said reser-

vation has been hitherto claimed by said Wisconsin bands under the terms of the aforesaid order of June 27, 1866. Exhibit A of the bill of complaint is a copy of all of the executive orders made in regard to the last-named reservation.

No withdrawal and setting apart of land about Lac Court Orielles for other Wisconsin bands of the Chippewa Indians under the provisions of subdivision 3 of article 2 of the treaty of 1854 took place until November 22, 1859, and April 4, 1865, and the permanent reservation of such lands was not made until March 1, 1873, by order of C. Delano, Secretary of the Interior of the United States. In this last-named reservation *no sections 16 were selected,* and Exhibit B annexed to the bill of complaint is a copy of all of the executive orders relating to the last-named reservation.

The facts in regard to the last-named reservation are set out in the bill of complaint for the purpose of showing the later construction which the Department of the Interior gave to the provisions of the treaty of 1854 as affecting school lands within the reservation.

There has never been any formal setting apart by the United States, since the treaty of 1854, of the La Pointe reservation. It seems to have been assumed that the agreement in the treaty to set apart a not yet fully surveyed tract was a setting apart and reserving of the same.

Neither the boundaries nor the description of the lands to be embraced in the Lac du Flambeau and Lac Court Orielles reservations were fixed or determined by the United States until after the lands embraced within such reservations had been surveyed and subdivided into sections and until after the title to sections 16 had absolutely vested in the State of Wisconsin.

In the case of the Lac Court Grielles reservation, where sections 16 were excluded, the United States Indian agent in his letter of February 17, 1873 (Exhibit B, bill), states this selection to be "satisfactory to the Indians, *fulfilling the spirit of the treaty* under which it is made, and fully securing the interests of the General Government as well *as those of the State of Wisconsin.*"

The State of Wisconsin has ever since its admission into the Union claimed *the right* to the fee of all sections 16 in the territory ceded by the Chippewa Indians in the treaty of 1843, and has since the survey of said lands claimed the fee thereof. It has exercised dominion and ownership of the same, has issued patents to divers parties on all such sections within the outer boundaries of the La Pointe reservation, and on all but twenty-nine forties of such sections within the outer boundaries of the Flambeau reservation. Taxes have been assessed and improvements made and timber cut on such sections, without interference on the part of the United States, until about the year 1899, when the defendant, the present United States Secretary of the Interior, set up a claim thereto on behalf of the Indians and forbade the cutting of timber by the grantees of the State. Under the treaty of 1854 the Secretary of the Interior has divided up the lands in these reservations among the Indians in allotments of eighty acres; patents have been issued to the allottees, who have become full citizens of the United States, have terminated their tribal relations, and have ceased to occupy any material part of the reservations in common. The lands in the reservation are ample, excluding sections 16, to secure to each individual Indian eighty acres in severalty, as far as

the same has hitherto been claimed. Notwithstanding more than fifty years have passed since the making of the treaty under which the defendant now asserts a right in these Indians, *no allotment has ever been made to any member of the tribe of any part of any section 16.*

The value of the lands in dispute is about $50,000.

The State of Wisconsin, by chapter 95, Laws of 1903, authorized the commencement of this action. All of the foregoing facts are admitted by the demurrer of the defendant.

ARGUMENT.

I.

The cession of the Chippewa territory in Wisconsin in 1843 conveyed the WHOLE *Indian* TITLE *and* RIGHT *of occupancy.*

The treaty contains terms the equivalent of terms of conveyance in a deed, viz., "the Indians *cede* to the United States *all* the country within the following boundaries," &c. The consideration is named and paid, to wit, a large sum in cash and merchandise and annuities for twenty-five years.

What did the United States get out of the treaty if not a relinquishment of the Indian title, which title was a *right* of *occupancy?* Prior to the treaty there was a *right* in the Indians practically in perpetuity which the United States *would not* terminate otherwise than by purchase. After purchase nothing remained to the Indians but a *permissive temporary occupancy,* a license to hunt and have the *privileges,* not the rights, of occupancy pending their removal to their

homes on the *unceded* lands spoken of in articles 3 and 5 of the treaty.

Is it possible that such permission to exercise such *temporary privileges* constituted "a legal impediment" within the meaning of the authorities to the grant by the United States to the State of an unencumbered *jus ad rem*" in sections 16 to be thereafter made definite by survey?

Can land in such relation to the United State be said to be such as "has been sold or otherwise disposed of" within the meaning of the provision in the school-land grant for substitution of other lands for section 16?

Was there after this cession of 1843 and up to the time the compact with the State became operative and binding any claim whatever on the United States to *reserve to the Indians any part of the ceded territory?*

If this permissive temporary occupancy was an encumbrance on the title from the United States to the State, then it was an encumbrance on every other part of the great domain, and from 1848 until 1854 or 1855 the State of Wisconsin had practically no jurisdiction over nearly half of its area, and the United States no right to dispose of any of the ceded land any more than unceded Indian land, which latter it has been uniformly held it would not take from the Indians except by purchase.

It is to be borne in mind that none of these sections were ever specifically occupied as the home of any member of any tribe, nor as part of any settlement or headquarters of any tribe, and had neither shanty, wigwam, or other improvements, nor even the crude tillage of the savage on any part of the same, but were mere undesignated spots of negligible extent and relation in the midst of a vast domain, a hundredth

part of which was ample for the Indian occupation contemplated by the treaty.

There can be no doubt that these Indians parted with every vestige of claim, legal, equitable, or as wards of a nation, to each and every parcel of the land embraced within the treaty, except a license to wander over any part which the United States failed otherwise to dispose of, until ordered by the President to get off. It is preposterous, however, to assume that the United States was, by such a stipulation for temporary occupancy, disabled from or fettered in making a disposition of *specific portions of the lands.*

Such a privilege of temporary Indian occupancy was expressly considered by this court in the case of Ward *vs.* Race Horse, 160 U. S., 504, and held to be destroyed and terminated by the mere act of admitting the State (Wyoming) into the Union. It is characterized by the court (p. 510) as "temporary and precarious" and not in any way to stay the advance of settlement and improvement or the jurisdiction of the newly created State over the Territory. Although not expressly overruling the *ex parte* decision in U. S. *vs.* Thomas, the principles announced are incompatible with the language relied upon by the Government in the Thomas case.

The history of the case of U. S. *vs.* Thomas is most peculiar.

Thomas, a Chippewa Indian, was convicted in the United States circuit court for the western district of Wisconsin of a murder alleged to have been committed on the La Court Orielles (Chippewa) Indian reservation. A motion to set aside the conviction, on the ground that it appeared that the crime was committed on section 16 of one of the townships within the reservation, and that, such section 16 being school land, the State had exclusive criminal jurisdiction over the

locus, was made, and, the district and circuit judges differing on the question of jurisdiction, that question was certified to this court.

There was *no appearance or argument* for Thomas nor on behalf of the claim of the State, while the United States solicitor argued in support of the jurisdiction. The hearing was therefore wholly *ex parte*, and has no value as *stare decisis* nor as a judicial opinion except to make lawful the *hanging* or life imprisonment of Thomas. The maxim *audi alteram partem* is of the essence of judicial determination in creating a precedent or rule for future guidance.

The wisdom of the maxim and its application is strikingly exemplified in that case, as it now appears as a *verity* in *this* case that *there are no sections 16 in the La Court Orielles* reservation, as section 16 in each of the townships from which the reservation is made up *is excluded therefrom.* (See Exhibit B, amended bill, schedule of lands in that reservation.)

The learned writer of the opinion in that case could not have had his attention called to the peculiar and limited character of the reserved privilege of temporary occupancy until removal to their *home* in the unceded lands beyond the Mississippi, or he would not have given such hunting and the like privileges the force of the original occupancy right and title, which right had been purchased and paid for by the United States.

The uncertainty of conclusions based on *ex parte* presentation is further shown in numerous other erroneous assumptions of fact in the opinion. The writer of the opinion was aided to a conclusion (p. 582) "that it was not contemplated that *any section* should be left out of any one" of the townships by his statement that "the land reserved was to be *as*

near as possible in a compact form," &c. Not only is nothing of that kind mentioned in the treaty, but the fullest latitude is given as to delineation, providing merely that "the tracts *shall equal in extent"* so many township or so many acres, as the case may be (subdiv. 2 and 3, art. 2, treaty). Again, on page 584 it is assumed that the surrender of the so-called right of occupancy, which is a misnomer, and the cession of "large tracts of land *in Wisconsin"* was a condition or consideration to the United States from the Indians for the reservations, whereas an examination of article 1 of the treaty discloses that no lands whatever *in Wisconsin* were ceded, and by article 4 of the treaty that the *consideration* for the cession was *money and merchandise.* Many other errors of *omission* of pertinent facts might be mentioned, but enough has been said to emphasize our claim that the Thomas case cannot be deemed an adjudication of the question involved here.

We discuss that case at some length for the reason that counsel for the Government, in view of the particular treaties in question here being discussed in the Thomas case, concludes his brief with this case, not only as the cap-sheaf of his argument, but as conclusive in the premises if all his other cases are beside the question.

II.

The United States, having the complete title to the land, unincumbered by anything but a temporary license to hunt, &c., over it, when Wisconsin was admitted as a State, could not after its specific grant to the State make such license a basis or consideration for creating an adverse title, whether the land were surveyed or not at the time of the grant.

From 1843 to 1854 there was no Chippewa Indian reservation or country in Wisconsin. It had *all been ceded* by the treaty of 1843. The members of the tribe hunted and fished over it merely by sufferance. The United States had and exercised the right during that period, at will, to dispose of any portion to settlers or otherwise, and in 1848 contracted with and granted to the new State of Wisconsin, for school purposes, practically one thirty-sixth of the territory covered by the cession of 1843 and not previously disposed of, by apt and adequate designation, as each sixteenth section, although not in every case delineated by survey. The *right* of Wisconsin to the land covered by such grant thereupon became absolute; the *legal title* awaited the survey, but the *jus ad rem* arose simultaneously with the birth of the State.

Beecher *vs.* Wetherby, 95 [redacted]., 524.

49

In 1854, with a then practically unlimited domain out of which to satisfy the request and desire—not the right—of some of the Chippewa bands, for such a modification of the treaty of 1843 as would enable them to remain east of the Mississippi, can it be said that the United States was at liberty to assign or set apart to such bands particular lands which n

the meantime it had by the highest and most solemn form of contract dedicated to the State of Wisconsin?

Counsel for the Government cite many cases on uncontested propositions running parallel but not touching complainant's specific contentions nor upon the lines of the present case. It is true that they have quoted fragmentary passages from the Heydenfeldt case (93 U. S., 634) and the Minnesota case (185 U. S., 373), which seem at first blush at variance with complainant's view, but, in so far as the former case is in conflict with the Beecher case (95 U. S., 524), it must be deemed overruled by the latter, and a critical examination of the Minnesota case will make it clear that not only does it not change the principles adjudicated in the Beecher case, but reaffirms them.

Leaving out of consideration the Thomas case, heretofore discussed, this case must be ruled by the case of Beecher *vs.* Wetherby, *supra,* for the reason that every *essential* element in the decision of that case is present in the case at bar.

The Heydenfeldt case was distinctly before the court when the Beecher case was decided. It had been but shortly before heard, and was cited on the brief of counsel. The distinction between the two cases was so obvious that the court does not deem it necessary to distinguish between them in his opinion

In Beecher *vs.* Wetherby the *title* was directly in issue. The plaintiff claimed under a U. S. patent issued to him in 1872 pursuant to an act of Congress of February 6, 1871 (16 Stat., 404), directing the sale of lands in the two townships set apart for the use of the Munsee and Stockbridge Indians, *including the section 16 in question;* the defendant claimed under a patent from the State in 1870, as part of its school lands. "The question for determination was which

of the two classes of patents transferred the title" (95 U. S., 522).

The exterior lines of the townships were run in 1852, the section lines in 1854, both *subsequent* to Wisconsin's admission into the Union (95 U. S., 519).

In January, 1849, the Menominee Indians ceded by treaty, ratified on that day, all their lands in Wisconsin, including those involved in the action, with a stipulation that they should be permitted to remain on the ceded lands until the President should notify them that the same was wanted (95 U. S., 518).

On February 1, 1853, the Wisconsin legislature gave their assent to the Menominees remaining in Wisconsin on the tract of land set apart for them, covering the tract in question, and by treaty between the Menominees and the United States, a specific tract of land, including the land in question, was set aside to the former *as their permanent home,* it being recited that on account of the great unwillingness of the Indians to remove west of the Mississippi the President had consented to their locating temporarily upon the Wolf and Oconto rivers.

The court upheld the State patent as against the United States patent, using the following language, quoted not only with approval, but as authority, in most of the cases cited in the Government's brief in this case, including the recent case of Minnesota *vs.* Hitchcock (185 U. S., 390):

"It was, therefore, an *unalterable* condition of the admission, *obligatory* upon the United States, that section sixteen (16) in every township of the public lands in the State, which had not been sold or otherwise disposed of, should be granted to the State for the use of schools. It matters not whether the words of the compact be considered as merely

promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. *In either case* (survey or no survey), the lands which might be embraced within those sections were *appropriated* to the State. *They were withdrawn from any other disposition,* and set apart from the public domain, so that *no subsequent law authorizing a sale of them could be construed to embrace them, although they were not specially excepted.*

"All that afterwards remained for the United States to do with them, and *all that could be legally done under the compact* was to identify the sections by appropriate surveys. THEY COULD NOT BE DIVERTED FROM THEIR APPROPRIATION BY THE STATE."

Later on in the opinion the court says:

"In this case the township embracing the land in question was surveyed in 1852, and subdivided into sections in 1854. *With this identification of the section the title of the State became complete unless there* HAD BEEN *a sale or other disposition of the property by the United States* PREVIOUS *to the compact with the State.* No *subsequent sale or other disposition* as already stated *could defeat the appropriation.*"

In what more unmistakable terms could the proposition of complainant be affirmed, that, the State being prior in right, the subsequent survey perfected and completed its title as against subsequent promises of the Government to the Indians?

The language quoted on page 49 of the defendant's brief from the Heydenfeldt case, that "until the status of the lands was fixed by survey Congress reserved absolute power over

them," &c., is not the statement of a *general principle*, but a statement of the *particular* status of lands in the State of Nevada with reference to *its* school-land grant.

The court found the school-land grant to Nevada in view of *its* peculiar terms, among other things expressing a grant *in præsenti*, when there were at the time no public lands in Nevada to be ambiguous, and properly construed it as leaving open to Congress any action it saw fit until after the sections were surveyed and segregated. Besides, it had relation to mineral rights always presumed to be reserved in the Government until the final vesting of title in a specific grantee.

The language of the court of somewhat similar import from the Minnesota case quoted in the Government's brief on the same page (49) must be read in connection with what preceded, expressly affirming the language of the Beecher case herein quoted, and particularly this sentence preceding the Government's quotation: "It is presumed that Congress will act in good faith, that it will not attempt to impair the scope of the school grant, *that it intends* that the State shall receive the *particular sections* or their equivalent in aid of its public-school system."

Congress has passed no law to affect the compact with the State. On the contrary, it and the executive department of the Government have permitted the right of the State in these particular sections to remain unchallenged for half a century, the first suggestion of any right in the Indians being made in 1899.

In 1854, with a then practically unlimited domain out of which to satisfy the request and desire—not the right—of

some of the Chippewa bands, for such a modification of the treaty of 1843 as would enable them to remain east of the Mississippi, can it be said that the United States was at liberty to assign or set apart or intended to assign and set apart to such bands particular lands which in the meantime it had by the highest and most solemn form of contract dedicated to the State of Wisconsin?

Can it be presumed that by designating a reservation for several small groups of Indians as a gratuity where specific or particular parcels were not of the essence nor of importance to the gift, where the primary purpose was distribution of lands in 80-acre tracts, to be followed by civilization, settlement on the allotted portions, and citizenship, the ending of hunting and fishing for a livelihood, and of the holding lands in common for the chase, bark and berry gathering, and other savage uses, it was intended that the particular land otherwise belonging to the State should be held in perpetuity for the descendants of such Indians?

III.

The treaty of 1854 expressly saved and secured all precedent rights conveyed or granted by the United States under the title acquired by it through the cession by the Indians in 1843.

Wisconsin became a Territory in 1836. Nearly half of its area consisted of this Indian country ceded in 1843. Between 1843 and 1854 it was inevitable that a multitude of scattered tracts within this territory would be disposed of to settlers, lumbermen, miners, and others by direct patent, the State admitted into the Union, with the customary grant of

school and swamp lands, and the advance of civilization and settlement penetrate into much of the country, taking up and developing lands in all sections of it. With the organization of the State, in 1848, settlement and improvement must and did make rapid strides. The treaty of 1854 recognized these conditions, and made provision by which the setting apart of reservations for certain of the Indians, contrary to the scheme of the treaty of 1843, which contemplated the removal of all of them west of the Mississippi, should not interfere with or overlap rights intermediately granted. It was accordingly expressly stipulated in article 3 of the treaty of 1854 that the President "may also make such changes in the *boundaries* of such reserved tracts or *otherwise* as shall be necessary *to prevent interference with vested rights.*" How could any vested rights arise as against the Indians or the United States if the Indians did not part with their title by the cession of 1843, or if their temporary occupancy of the whole tract, for hunting, &c., was tantamount to a retention of such title?

The conclusion is certain that under the treaty of 1843 the Indians reserved no title, and under the treaty of 1854 acquired no right to any *particular* land in the territory, that the intervening title granted by the United States to the State is paramount, and that the treaty of 1854 only promised the Indians the equivalent in area or acres of the reservations provided for.

In Gaines *vs.* Nicholson, 9 How., 365, the court says, *arguendo:*

"But the question here is, whether the reservation of a right, not to any particular parcel or section of the territory ceded, but a right, generally, to have that quantity of land out of it, and to be located under the direction of the President, stands upon the same footing and has the effect to cut

off the right claimed by the State to have attached under the acts of Congress to the school section previous to the location made by the President."

The State had a grant of explicitly designated portions of the land within the territory, not in every instance surveyed at the time of the grant, but unmistakably ascertainable by survey. As far as the lands in question are concerned, the enclosing township and range lines were actually surveyed by the Land Department prior to 1854.

IV.

The conditions in the case of Minnesota vs. Hitchcock, 185 U. S., 373, are entirely reversed in the present case.

In the Minnesota case the lands involved were *unceded* Indian lands at the date of Minnesota's admission into the union. Minnesota was admitted into the Union in 1857. It was stipulated in the Minnesota case that, except as its status was affected by a treaty of October, 1863, and an order of the President in 1879 and certain acts of Congress in 1889 and 1890 (185 U. S., 376), the lands in controversy continued to be unceded Indian lands, *subject to the* ORIGINAL *right of occupancy* up to March 4, 1890.

The land in question in that case, "the Red Lake Indian reservation," had been embraced in unceded Chippewa Indian country up to the year 1879, when it was expressly recognized as such by the President's order of March 18, 1879. As to that reservation, the Indian title was prior and precedent in time and in official recognition by the United States to the admission of Minnesota into the Union.

The congressional joint resolution of March 3, 1857, in response to the application of the Territory of Minnesota for admission into the Union expressly provided (185 U. S., 375) that "lands reserved for public uses before survey had been made, should have other lands substituted therefor, to be selected by the State."

The Wisconsin corresponding provision (subdiv. 1, art. 7, enabling act of August 6, 1846) provided that "where such section *had been* sold or otherwise disposed of, other lands, etc., should be granted."

How can it, with any countenance, be claimed that any of the school sections in the *after-created* Indian reservations *had been* sold or disposed of prior to 1848, the year of the grant to the State?

V.

In no possible view have the Indians more than a hunting and fishing privilege on these lands. The fee should be declared by this court to be in the State of Wisconsin, so as to assure to its grantees the title to the timber thereon, subject to no restraint or limitation, but if any, only such reasonable regulations as the Land Department might impose to protect temporary occupancy.

It is almost apparent from the location and valuation of the land in question that it is well timbered. Assuming an Indian right of temporary occupancy stretched beyond a period of 50 years, shall it still be effective to prevent the owner of the fee from appropriating the standing timber, which is part of the realty, by converting it into merchantable timber? By what process of reasoning can this tran-

sient right of occupation be construed at this time, when the lands held in common have practically been distributed and are held in severalty, be regarded as a bar to the fee owner's exercise of ownership over the timber?

As early as the case of United States *vs.* Cook, 19 Wall., 591, and in a multitude of cases since, the absence of title in the Indians to timber on lands occupied by them and the right of the United States as owner of the fee to maintain replevin for such timber when cut is established and recognized. Can it be said then that the State, the grantee of and successor to such fee, has not a similar right, resting on ownership? This last proposition is of special importance in case the court should hold that any right of occupancy at this late day exists in favor of any of these Indians on any of these school sections in Wisconsin as against the State or its grantees, as the bill shows that the claim of the Indians has been asserted by the present Secretary of the Interior in attempts to forbid and prevent the appropriation by such owners of such timber. In no event can any part of these lands ever be patented by the United States, for under all the authorities the fee is in the State of Wisconsin.

Is not the right of occupancy mentioned in article 2 of the treaty of 1843 to be deemed at an end after so great a lapse of time, or shall it, like the brook, "go on forever," in the absence of a specific order of removal by the President?

We insist that the demurrer of the defendant should be overruled on the broad ground that the title to the school sections in question is in the State of Wisconsin and its grantees unincumbered with any trust in the United States in favor of the Indians.

The Government in its brief suggests, without pressing the point, that the jurisdiction of this court may be defeated as to the lands said to be in the La Pointe Indian reservation, because the State is the complainant and alleges that it has issued patents on all school lands within that reservation's outer boundaries. A sufficient answer would seem to be that the bill is not divisible into sections, and the status of the other lands confessedly gives jurisdiction and takes the present one out of the category of moot cases. Besides, it has been often held that the *obligation* of the United States respecting relief invoked is sufficient to enable it to maintain an action to revoke a patent, and no reason is apparent why the same rule should not apply to a State.

U. S. *vs.* San Jacinto T. Co., 125 U. S., 273.

U. S. *vs.* Beebe, 127 U. S., 338.

L. M. STURTEVANT,
Attorney General for Wisconsin.

T. W. SPENCE,
Of Counsel.

FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, 1925.

ORIGINAL. No. 12.

THE STATE OF WISCONSIN, COMPLAINANT,
v.
ETHAN ALLEN HITCHCOCK, AS SECRETARY of the Interior, defendant.

In Equity

BRIEF AND ARGUMENT FOR DEFENDANT.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ORIGINAL NO. 12.

THE STATE OF WISCONSIN, COMPLAINANT,
v.
ETHAN ALLEN HITCHCOCK, AS SECRETARY of the Interior, defendant.
} In Equity.

STATEMENT.

This proceeding seems to be authorized by the act of Congress of March 2, 1901 (31 Stat., 950), (*Minnesota* v. *Hitchcock*, 185 U. S., 373), and the act of the Wisconsin legislature, approved April 20, 1903. (Second amended bill, Subdv. XIX, p. 22.)

By its second amended bill of complaint, the State of Wisconsin claims that by virtue of the school land grant contained in section 7 of the enabling act of August 6, 1846 (9 Stat., 56, 58), which was subsequently accepted by the constitutional convention called in pursuance of such act and ratified by an article in the constitution submitted by it (which constitution was adopted by a vote of the people of Wisconsin March 2, 1848), said State claims the absolute

fee title to and complete dominion over all of the lands embraced in section 16 in each township within the present limits of the La Pointe or Bad River Indian Reservation and the Lac Du Flambeau Indian Reservation in said State, being sections 16 in Ts. 46 and 47 N., Rs. 2 and 3 W., T. 47 N., R. 1 W., T. 48 N., R. 3 W., T. 40 N., R. 5 E., and T. 41 N., Rs. 4 and 5 E., and prays that the defendant, as Secretary of the Interior, be restrained and enjoined from interfering in any manner with the possession, use, or enjoyment of the lands within said sections, or any part thereof, by the State or its grantees, or from interfering with the exercise of acts of ownership by the State or its grantees in respect to said lands.

The defendant has filed a demurrer to the second amended bill of complaint which, in effect, denies that the complainant is entitled to the relief demanded or to any relief, and challenges the jurisdiction of the court in regard to the subject-matter of the action.

The allegations set forth in said bill, in so far as the same are pertinent to the questions raised by the demurrer in effect, are as follows:

1. That the Wisconsin enabling act was passed August 6, 1846 (9 Stat., 56, 57, 58), and the act of admission May 29, 1848 (9 Stat., 233, 234, 235).

2. That that part of section 7 of the enabling act which provides for the grant of lands to said State reads as follows:

> That section numbered sixteen in every township of the public lands in said State, and where such section has been sold or otherwise

disposed of, other lands equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools.

3. That prior to March 28, 1843, all the land included within the above-mentioned Indian reservations was unceded Indian land and occupied by various branches of the tribe of Chippewa Indians and by the tribes of Menominee and Winnebago Indians. (Second amended bill, Subdv. IV, pp. 4, 5, 6, and 7.)

4. That by Article I of the treaty of March 28, 1843 (7 Stat., 591), made and concluded between the Chippewa tribe of Indians and the United States, the former ceded to the latter all the lands embraced within the above-mentioned Indian reservations. (Second amended bill, Subdv. IV, pp. 4–5.)

5. That by the first article of the treaty made and concluded September 30, 1854, and proclaimed January 29, 1855 (10 Stat., 1109), between the United States and the Chippewa tribe of Indians, the latter "ceded to the former a large tract of land, therein described, lying within the present boundaries of the State of Minnesota." (Second amended bill Subdv. VIII, pp. 9–16.) That by article 2 of said treaty the United States agreed to set apart and withhold from sale for the use of the La Pointe band of Chippewa Indians and such other Indians as may see fit to settle with them, a part of the lands ceded by the terms of the said treaty of March 28, 1843, and to set apart and withhold from sale for the use of the Wisconsin band of Chippewa Indians, another part of the land so ceded. The lands so reserved for the La Pointe band

was definitely described, while the land so reserved for the Wisconsin band was referred to as "a tract of land lying about Lac Du Flambeau and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President." (Second amended bill, Subdv. VIII, pp. 10–11.)

6. That in and by the treaty of 1854 (art. 3), it was agreed that each member of the Chippewa tribe who was the "head of a family or single person over twenty-one years of age," should be entitled to "eighty acres of land for his or their separate use." (Second amended bill, p. 12.) And by article 11 it was agreed that—

> the Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President. (Second amended bill, p. 15.)

7. That the tract of land agreed to be set apart and withheld from sale for the La Pointe band of Indians by article 2 of the last named treaty and known as the La Pointe or Bad River Reservation, included, among other things, all of said Ts. 46 and 47 N., Rs. 2 and 3 W., parts of T. 48 N., R. 3 W., including the section 16 therein in controversy and part of 47 N., R. 1 W., including the section 16 therein in controversy. (Second amended bill, Subdv. X, pp. 16–17.)

8. That the tracts of land agreed to be set apart and withheld from sale for the Wisconsin band of

Indians by the provisions of article 2 of the last-mentioned treaty, known as the Flambeau Indian Reservation, were designated and described by order of the Secretary of the Interior dated June 28, 1866, and embraced, among other lands, part of said T. 41 N., R. 4 E., including the section number 16 of said township; all of said T. 40 N., R. 5 E., and all of said T. 41 N., R. 5 E. and that no further action has been taken by the United States with regard to said reservation, and the same has been held and claimed by the Wisconsin band of Chippewa Indians since the making of the aforesaid treaty of 1854. (Amended bill, Subdv. XI, pp. 17–18.)

9. That the townships named and described were designated and sectionized by the United States pubilc survey as follows:

> In the year 1847 the east line of township numbered 46 north, of range 2 west, and the west line of township number 47 north, range 1 west, were duly surveyed by the United States; that in the year 1852 all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west, and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times thereafter in the years 1856, 1858, and 1873.
>
> In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860, the east line of said towns 40 and 41, 4 east; and in September, 1861, the south, east, and west

lines of towns 40 and 41, 5 east; and in August, 1864, the south and west lines of townships 40 and 41, 4 east; and in July, 1865, each of said townships was subdivided by such surveys into sections. (Second amended bill, Subdv. X and XI, pp. 16–17.)

10. That the State of Wisconsin has parted with all its interest, if any it had, in sections 16 in controversy, located within the La Pointe Indian Reservation. (Second amended bill, Subdv. XV, p. 20.)

11. That under the treaty of 1854 aforesaid and in carrying out its provisions the defendant as Secretary of the Interior has proceeded through the Indian Bureau to allot from time to time to the various members of said tribes of La Pointe bands of Indians and to various members of the Wisconsin bands on said Lac Du Flambeau Reservation 80 acres per capita of lands within said reservations, and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States and have terminated their tribal relations, and have ceased to occupy any material part of said reservations in common. (Second amended bill, Subdv. XVI, p. 21.)

12. That the lands within said reservation, exclusive of the lands in sections 16, are sufficient to secure 80 acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of Indians of any land embraced within any of said sections. (Ib.)

13. That the defendant, as Secretary of the Interior, insists that the La Pointe and other bands of Chippewa tribe of Indians or members thereof have a claim or interest in or a title to said sections 16, and in their behalf has forbidden anyone to enter and make improvements or cut timber thereon, and has interfered with and is "continuing to interfere with the use and enjoyment of the same" by the State and its grantees. (Second amended bill, Subdv. XVIII, pp. 21–22.)

In addition to the allegations set forth in the second amended bill, some of the provisions of the act of February 8, 1887 (24 Stat., 388), and the act of February 11, 1901 (31 Stat., 766), are pertinent. Section 1 of the first-named act reads in part as follows:

> That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or Executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:
>
> To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years of age now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section.

Section 6 of said act provides in part as follows:

> And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the the right of any such Indian to tribal or other property.

Omitting the enacting clause, the act of February 11, 1901, reads as follows:

> That with the consent of the Chippewa Indians of Lake Superior, located on the Bad River Reservation, in the State of Wisconsin,

to be obtained in such manner as the Secretary of the Interior may direct, the President may allot to each Indian now living and residing on said reservation and entitled to so reside, and who has not heretofore received an allotment not exceeding eighty acres of land, such allotments to be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third article of the treaty with the Chippewas of Lake Superior and the Mississippi, concluded September thirtieth, eighteen hundred and fity-four.

POINTS AND AUTHORITIES.

A.

Effect of the Demurrer.

The demurrer admits only such allegations in the bill as are well and sufficiently pleaded. It does not admit those allegations which amount to mere conclusions from the facts stated, or the legal effect of the provisions of section 7 of the Wisconsin enabling act, or the provisions of the treaties with the Indians. These are matters for the court exclusively. (*Daniel's Chancery Pleading and Practice*, Vol. I, p. 552, fifth edition; *Maese* v. *Herman*, 17 Appeals, D. C., 52, 59; *Cosmos Exp. Co.* v. *Gray Eagle Company*, 190 U. S., 301, 308.)

B.

The Rule of Construction Applicable to the Provisions of an Indian Treaty.

The words of an Indian treaty are to be construed as they were understood by the Indians, and not to

their prejudice. (*Worcester* v. *State of Georgia*, 6 Pet., 515, 582; *Choctaw Nation* v. *United States*, 119 U. S., 1, 28; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 396; *United States* v. *Rickert*, 188 U. S., 432, 443; *Matter of Heff.*, 197 U. S., 488, 499; *United States* v. *Winans*, 198 U. S., 371, 380–381; *Francis* v. *Francis et al.*, 99 N. W. Rep., 14.)

C.

The Rule Governing the Construction of the Provisions of a School Grant to a State by the Government.

1. The grant describes and is confined to public lands. Lands are not public unless they are subject to sale or other disposal under the general land laws. They are not subject to sale and disposal under such laws if, at the date of the grant, they are burdened with an Indian right of occupancy. Nor are they public lands, as the term is understood, until surveyed into townships and designated by sections. (*Newhall* v. *Sanger*, 92 U. S., 761, 763; *Leavenworth, etc., Railway Company* v. *United States*, 92 U. S., 733, 741; *Missouri, Kansas and Texas Railroad Company* v. *Roberts*, 152 U. S., 114, 119; *Northern Pac. R. R. Co.* v. *Musser-Sauntry Company*, 168 U. S., 604, 609; *Tyler B. Thompson*, 32 L. D., 468, 470.)

2. No title to sections mentioned in a school grant vests in a State until the same are identified by a public survey. (*Gaines* v. *Nicholson*, 9 How., 356, 365; *Cooper* v. *Roberts*, 18 How., 173, 179; *Sherman* v. *Buick*, 93 U. S., 209, 214–215; *Heydenfeldt*

v. *Daney Gold, etc., Company*, 93 U. S., 634, 640; *Beecher* v. *Wetherby*, 95 U. S., 517, 524; *Water and Mining Company* v. *Bugbey*, 96 U. S., 165, 167; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 393; *Bullock* v. *Rouse*, 81 Calif., 591, 593–594–595; *State of Colorado*, 6 L. D., 412, 415; *Barnhurst* v. *State of Utah*, 30 L. D., 314, 317; *Mahoganey Number 2 Lode Claim*, 33 L. D., 37.)

3. Sections of land contemplated by a school grant which, while unsurveyed, fall within an Indian reservation are subject to the Indian right of occupancy, and until such occupancy has been extinguished such sections are in suspension. (*Cherokee Nation* v. *Georgia*, 5 Pet., 1, 48; *Wilcox* v. *Jackson*, 13 Pet., 498, 513; *Gaines et al.* v. *Nicholson et al.*, 9 How., 356, 364–365; *United States* v. *Cook*, 19 Wallace, 591, 593; *Leavenworth, etc., Railway Company* v. *United States*, 92 U. S., 733, 742–743, 745; *Beecher* v. *Wetherby*, 95 U. S., 517, 526; *Buttz* v. *Northern Pacific R. R. Company*, 119 U. S., 55, 66, 70, 71; *Bardon* v. *Northern Pacific Railroad Co.*, 145 U. S., 535, 538–539; *United States* v. *Thomas*, 151 U. S., 577, 582, 583, 584; *Missouri, Kansas and Texas Ry. Company* v. *Roberts*, 152 U. S., 114, 116, 117, 118, 119, 120, 121; *Spalding* v. *Chandler*, 160 U. S., 394, 402, 403–405; *Pine River Logging Company* v. *United States*, 186 U. S., 279, 284; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 388, 389; *Barker* v. *Harvey*, 181 U. S., 481, 490–492; *United States* v. *Rickert*, 188 U. S., 432, 437, 441; *Scott* v. *Carver*, 196 U. S., 100, 109,

111; *United States* v. *Winans*, 198 U. S., 371, 380, 381; *Northern Pacific Railroad Company* v. *Maclay et al*, 61 Fed., 554, 556; *Gibson* v. *Anderson*, 131 Fed. Rep., 39, 42; *Buster* v. *Wright*, 135 Fed. Rep., 947, 952; *United States* v. *Blendauer*, 122 Fed. Rep., 703, 708; *Francis* v. *Francis et al.*, 99 N. W. (Michigan), 14; *State of Colorado*, 6 L. D., 412, 418; *Callanan et al.* v. *Chicago, Milwaukee and St. Paul Ry. Co.*, 10 L. D., 285, 288; *Henry Sherry*, 12 L. D., 176, 178, 180; *State of Louisiana*, 17 L. D., 440; *State of Wisconsin*, 19 L. D., 518, 519; *State of Minnesota*, 28 L. D., 374, 380; Opinion Asst. Attorney-General Van De Vanter to Secretary of the Interior (unreported), dated Nov. 27, 1901. See copy appendix.)

4. If, at the time of the public survey, a tract of land contemplated by a school grant is encumbered by a right of occupancy in an Indian tribe, the State may elect to take equivalent lands, or it may wait until such right of occupancy has been extinguished and take the land contemplated. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 392, 393; *State of Colorado*, 6 L. D., 412, 418; *State of Colorado*, 12 L. D., 70, 71; *State of Louisiana*, 17 L. D., 440.)

5. If, at the date of a school grant to a State, the sections are not identified by the Government survey, and are within an Indian reservation, Congress is not obliged to transform them from their original status, and may dispose of them for other purposes. (*Minnesota* v. *Hitchcock*, 185 U. S., 373, 393, 394.)

D.

The Rule in Regard to the Creation of an Indian Reservation.

1. It is not necessary that the treaty providing for a reservation should describe the particular tract to be thereafter occupied by the Indians, nor is it necessary that a particular tract be designated for that purpose by Congress or by the President. If, after the treaty is signed, the Indians occupy a particular tract without objection by, or interference from, the Government, such tract is a reservation to the same extent as though it had been specifically designated by the treaty. (*United States* v. *Carpenter*, 111 U. S., 347, 349; *Spalding* v. *Chandler*, 160 U. S., 394, 404; *Minnesota* v. *Hitchcock*, 185 U. S., 373, 390, 391; *State of Minnesota*, 22 L. D., 388.)

2. A treaty which provides for a reservation for the Indians is a grant of rights from and not to them, and a retention to them of rights not granted. (*United States* v. *Winans*, 198 U. S., 371, 381.)

E.

The Duty and Power of the Secretary of the Interior in Respect to Indian Reservations.

1. The Secretary of the Interior, under the direction of the President, has the power, and it is his duty, to prevent intrusion upon Indian reservations and to remove intruders therefrom. (*Morris* v. *Hitchcock*, 194 U. S., 384, 391, 392; *United States* v. *Mullin*,

71 Fed. Rep., 682, 288, 289; *Eells* v. *Ross*, 64 ib., 417, 419; *Beck* v. *Flournoy*, 65 ib., 30; 27 U. S., App. 618; 168 U. S., 996; *Pilgrim et al.* v. *Beck et al.*, 69 ib., 895; *Maxey* v. *Wright*, 54 S. W., 307; 23 Ops. Attys. General, 218.)

2. Where a treaty with an Indian tribe, or an act of Congress, provides that an Indian reservation shall be allotted to the Indians in severalty, the Secretary of the Interior, pending allotment, has jurisdiction over the reservation and the power to remove intruders therefrom, and the courts will not interfere with his action in respect to allotment or with the exercise of his power to remove intruders. (*Morris* v. *Hitchcock*, supra; *Brown* v. *Hitchcock*, 173 U. S., 473, 477; *New Orleans* v. *Payne*, 147 ib., 261, 264, 267.)

ARGUMENT.

Whatever right or title the State of Wisconsin has to the lands in controversy is based upon the provisions of its school grant contained in section 7 of the enabling act of August 6, 1848 (9 Stat., 56, 58), and which reads as follows:

> That section numbered sixteen, in every township of the public lands in said State and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools.

By virtue of this grant the State alleges (Subdv. VII, p. 8, second amended bill) that when admitted into the Union it—

> became vested with an absolute right in and to all the sections sixteen within [the territory ceded to the United States by the Chippewa Indians under article one of the treaty of March 1, 1843] subsequently surveyed by the United States with the right in said State to have any temporary possession and occupancy of the Indians * * * terminated by the United States.

The allegations so set forth in said subdivision 7, as well as all other statements in the bill to the effect that the State is vested with and has a complete title to and has absolute dominion over the sections 16 in question, are merely statements of the legal effect of the treaties, laws, and documents referred to in the second amended bill, hence are not admitted by the demurrer. (*Cosmos Company* v. *Gray Eagle Company*, 190 U. S., 301, 308; *Maese* v. *Herman*, 17 Appeals, D. C., 52, 59.)

In the case last cited the court states:

> It is a well-settled principle in the law of demurrer that while the demurrer admits as true, for the purposes of the decision invoked by it, all facts well and sufficiently pleaded, yet it does not admit as true mere matters of law which the pleader may think proper to state in his pleadings, nor the conclusions drawn from the facts stated therein. That is for the court exclusively. Nor does the demurrer in any manner admit the correctness of an allegation as to the construction of a statute, or of a grant, or other document, or

official act, that may be insisted upon by the pleader, as the foundation of his claim and title, or that may be set up in opposition thereto. That is matter of law, for determination by the court. These propositions are too clear to require citations of authority for their support.

DEFENDANT'S CONTENTION.

The defendant, as matter of law, contends that the claim of the State is not warranted by the allegations of fact contained in the second amended bill of complaint, which are admitted to be true by the demurrer, and that the court is without jurisdiction in respect to the subject-matter of the action. This contention is based upon the following propositions:

1. That whatever right or title the State has or had to the lands embraced within the sections 16 in controversy if any it has or had, is subject to the right of occupancy by the La Pointe band of the Chippewa tribe of Indians, and by the Wisconsin band of the same tribe, and that until such occupancy ceases or the right is extinguished, neither the State nor its grantees are authorized to take possession of the same, or any part thereof, or to make improvements thereon or to remove timber therefrom.

2. That the lands embraced in the sections 16 which fall within the La Pointe Reservation are subject to allotment in severalty to such members of the La Pointe band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and under the provisions of the said acts of February 8, 1887, and of February 11, 1901, provided there are not sufficient other lands for such purpose within said reservation. And that the lands embraced in the sections 16 which fall within the Flambeau Reservation are subject to allotments in severalty to such mem-

bers of the Wisconsin band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and the provisions of the act of February 8, 1887, provided there are not sufficient other lands for such purpose within the Lac Du Flambeau and Lac Court Orielles reservations.

3. The question in regard to what Indians are entitled to allotments of land within said reservations is administrative or political in its nature, to be determined by the Indian Bureau, and its action in the premises can not be controlled or interfered with by the courts either by injunction or mandamus proceedings. Not until the Indian Bureau has finally acted in the matter may the courts review its action and correct it if wrong.

4. That until the Indian right of occupancy has been extinguished, either by act of Congress or by the acceptance by all of the Indians on said reservation of allotments and patents therefor, as Secretary of the Interior, the defendant is clothed with the power, and it is his duty, to prevent any person or persons from interfering with the possession, use, and enjoyment by the Indians of all or any part of said reservations, including the lands within the sections 16 in controversy.

5. Even though the right of occupancy in the Indians were now extinguished, so far as concerns the La Pointe Reservation, the State of Wisconsin has no such interest as entitles her to bring an action in any court in regard to any section 16 therein.

DEFENDANT'S FIRST PROPOSITION.

That whatever right or title the State has or had to the lands embraced within the sections 16 in controversy, if any it has or had, is subject to the right of occupancy by the La Pointe band of the Chippewa tribe of Indians, and by the Wisconsin band of the same tribe, and that until such occupancy ceases, or the right is extinguished neither the State nor its grantees are authorized to take possession of the same, or any part thereof, or to make improvements thereon or remove timber therefrom.

This proposition is supported by the facts expressly admitted in the second amended bill, and by inference logically to be drawn therefrom and the law applicable to such facts. For convenience of reference these facts are restated here and are as follows:

1. By article 1 of the treaty between the Chippewa Indians of the Mississippi and Lake Superior and the United States, dated March 28, 1843 (7 Stats. 791), the former ceded to the latter a large tract of land which included all the land now embraced in the sections 16 in controversy.

2. By article 2 of the said treaty said Indians reserved—

> the right of hunting on the ceded territory with the other usual privileges of occupancy until requested to remove by the President of the United States.

3. By the first article of the treaty between the United States and the same tribe of Indians dated September 30, 1854, and proclaimed January 29, 1855 (10 Stat., 1109), the latter ceded to the former a large tract of land in the Territory, now the State, of Minnesota, and that by the second article thereof it was provided, among other things, in effect, that a tract of country therein described, formerly ceded by the treaty of March 28, 1843, and from the date of the second treaty until the present time known and designated as the La Pointe or Bad River Reservation, be set apart and withdrawn from sale for the use of the La Pointe band of Chippewa tribe of Lake Superior Indians, which tract included the lands now

embraced in the sections 16 in controversy within townships 46 and 47 north, ranges 2 and 3 west; township 48 north, range 1 west, and township 47 north, range 1 west; that there be set apart and withheld from sale for the use of the Wisconsin band of Chippewas of Lake Superior—

> A tract of land lying about Lac Du Flambeau and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

That immediately thereafter the said Wisconsin band of Indians, with the consent of the United States, took possession of the tract of land known as the Flambeau Reservation, and have, ever since, occupied said tract, which tract includes, among other lands, the lands now embraced in sections 16 in controversy in township 41 north, range 4 east; township 40 north, range 5 east, and township 41 north, range 5 east.

4. That by article 11 of the last-named treaty, the United States agreed, among other things, in effect, that neither the La Pointe band of Indians or the Wisconsin band of Indians, or any member of either of said bands, should "be required to remove from the homes * * * set apart for them" by the terms of the said treaty.

5. That the right of occupancy secured to the La Pointe and Wisconsin band of Indians in respect to the lands embraced in the sections 16 in controversy has not been extinguished.

6. That the lands embraced within the sections 16 in controversy had not been designated by the public survey when Wisconsin was admitted into the Union, nor until after the promulgation of the treaty of 1854.

In considering and determining the force and effect of these facts, the first question which presents itself is:

What rights were guaranteed to the Indians, in respect to the lands involved, by the treaties mentioned?

This question is to be determined not by the application to provisions of the treaties of the ordinary rules of statutory construction, but by what the court believes was the understanding of the Indians themselves at the dates the treaties were made.

Upon this question Mr. Justice McLean, in *Worcester* v. *State of Georgia* (6 Pet., pp. 515, 582), says:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

In *Choctaw Nation* v. *United States* (119 U. S., 1, 28) the court speaking through Mr. Justice Matthews, said:

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former,

> and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

In *Minnesota* v. *Hitchcock* (185 U. S., 373) the court uses this language at page 396:

> If the language [of a treaty] carries upon its face one obvious meaning, and would naturally be so understood by the Indians, that construction within all the rules respecting Indian treaties must be enforced.

It will be noticed that article 2 of the first-named treaty, second amended bill, page 5, conferred upon the President the power to remove the Indians at any time from the lands reserved by said treaty, or from any part thereof. But that by the second treaty, article 11, second amended bill, page 15, this power was not conferred so far as the land ceded by the first treaty is concerned and reserved by the second treaty, but conferred only in respect to such lands as were ceded by the second treaty, none of which are in controversy here.

In view of the stipulations contained in article 2 of the first treaty can it be contended otherwise than that subsequent to its date, and prior to the date of the second treaty, the Chippewa tribe of Indians understood that they were to have the undisturbed use, possession, and enjoyment of the tracts of land in controversy until such time as the President saw fit to remove them? And can it be seriously questioned that when the said tribe agreed to the second treaty they believed they had secured, by article 11 thereof, to the La Pointe band and the Wisconsin band the possession, use, and enjoyment of the tracts of land now embraced in the sections 16 in controversy, and that neither band would be thereafter disturbed in said possession, use, and enjoyment?

Defendant concedes, however, that notwithstanding the belief and understanding of the Indians, Congress at any time could have terminated the privileges secured to the Indians by either of said treaties and provide for their removal from all or any part of the land reserved to them thereby, and to extinguish the right of occupancy so secured to the Indians.

The second question that is presented, therefore, is:

Has Congress extinguished such right of occupancy?

The answer to this question depends upon the construction to be placed upon the language of the Wisconsin school-land grant, which is found in section 7 of the enabling act (9 Stat., 56, 58).

Like all grants of a similar character it contemplates "public lands" only. "The words 'public lands,'" says this court in *Newhall* v. *Sanger* (92 U. S., 761, at page 763), "are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws." The same meaning to the words "public lands" is given by the court in *Bardon* v. *Northern Pacific Railroad Company* (145 U. S., 535, 538) and *Mann* v. *Tacoma Water Company* (153 U. S., 273, 284). (See *Barker* v. *Harvey*, 181 U. S., 481, 490.)

The lands embraced within the sections 16 in controversy were not subject to sale or other disposal under general laws when the school grant was made, or when it became effective, if prior thereto they had not been designated by the public survey.

This proposition is supported by numerous decisions of this and other courts and hereinafter referred to.

Were the lands embraced in said sections surveyed when the grant was made or when it became effective?

The allegations of fact in respect to this matter are found in subdivisions 10 and 11 of the second amended bill, pages 16 and 17, and read as follows:

> That in the year 1847 the east line of township numbered 46 north, of range 2 west, and the west line of township number 47 north, range 1 west, were duly surveyed by the United States; that in the year 1852 all of the township lines of town 47 north, ranges 2 and 3 west, and the south and west lines of town 48, ranges 2 and 3, and the south, west,

and north lines of township 48 north, ranges 2 and 3 west, were duly surveyed by the United States, and the sectional subdivisions of each of said townships were duly surveyed at various times thereafter in the years 1856, 1858, and 1873.

That for the purpose of setting apart a tract of land lying about Lac Du Flambeau for other Wisconsin bands of said Indians mentioned in subdivision 3 of article 2 of said treaty, surveys were made under the direction of the United States as follows: In July, 1857, the north line of townships 40 and 41, 4 and 5 east; in September, 1860 the east line of said towns 40 and 41, 4 east; and in September, 1861, the south, east, and west lines of towns 40 and 41, 5 east; and in August, 1864, the south and west lines of townships 40 and 41–4 east; and in July, 1865, each of said townships was subdivided by such surveys into sections.

Chapter IX of the Revised Statutes, second edition, 1878, provides for the survey of the public lands. The first, second, and third paragraphs of section 2395 read as follows:

SEC. 2395. The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed

from no further than such particular circumstances require.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles, and by making a corner on each of such lines at the end of every mile. The sections shall be numbered, respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six be completed.

As to what constitutes a survey within the meaning of said section 2395 is clearly and concisely stated in the case of *Bullock* v. *Rouse* (81 Cal., 590), at page 594, as follows:

> The Government survey of the public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections, and quarter sections. (Rev. Stats., secs. 2395 et seq.)
>
> It is not necessary that a whole township be surveyed at one time, and often different parts of a township are surveyed at different times, but no survey of any part is complete until the lines and corners about that part

> are run and established as required by the statute. "Even after a principal meridian and a base line have been established, and the exterior lines of the township have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is subdivided into sections and quarter-sections by an approved survey. The lines are not ascertained by the survey, but they are created." (*Robinson* v. *Forrest*, 29 Cal., 325.) "There is, in fact, no such tract of land as that described in the petition until it has been located within the Congressional township, by an actual survey and establishment of the lines, under the authority of the United States, and the survey has been approved by the proper United States surveyor-general. A person may approximate to the lines that may be run—may surmise the precise lines—but the tract has no separate legal identity until the survey is made and approved under the authority of Congress." (*Middleton* v. *Low*, 30 Cal., 605.)

The doctrine laid down in this case has been followed by the Interior Department in *Barnhurst* v. *State of Utah* (30 L. D., 314) and also in *Mahoganey Number 2 Lode Claim* (33 L. D., 37).

In the case of *Gaines et al* v. *Nicholson et al* (9 How., 306) the State of Mississippi had acquired from the Government for schools purposes a right to every sixteenth section of the public land within the State. At the time of the grant a large tract of land, including the particular land in controversy in that case,

was occupied by the Choctaw Nation of Indians. Subsequent to the grant and before the survey said nation ceded to the Government a large tract of territory, including the tract in controversy, reserving a section to an Indian named Wall "to be located upon some portion of the ceded territory—what, in common parlance, is denominated a float." Wall assigned his right to Gaines and Green, who subsequently selected the section 16 in controversy in that suit. Nicholson and others were school trustees and had leased the section to one Hillman. Gaines and others thereafter instituted an action of ejectment against Hillman, whereupon Nicholson and others filed a bill in equity against Gaines and others, praying, among other things, that they be enjoined from proceeding with the action of ejectment on the law side of the court. In disposing of the case, this court said in effect (p. 365) that under the terms of the school grant no title vested in the State until the lands contemplated by the grant had been sectionized by the public survey.

In *Cooper* v. *Roberts* (18 How., 173), at page 179, the court says among other things:

> The State of Michigan was admitted to the Union, with the unalterable condition " that every section No. 16, in every township of the public lands, and where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to the State for the use of schools." We agree, that until the

> survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title. The *jus ad rem* by the performance of that executive act becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others. (*Gaines* v. *Nicholson*, 9 How., 356.)

The above was quoted and approved in *Beecher* v. *Wetherby* (95 U. S., 517, 524), also in *Minnesota* v. *Hitchcock* (185 U. S., 373, 393).

In *Heydenfeldt* v. *Daney Gold, etc., Company* (93 U. S., 634, 640) the court, having under consideration the grant of school lands to the State of Nevada, among other things says:

> Until the status of the lands was fixed by the survey and they were capable of identification, Congress reserved absolute power over them; and if, in exercising it, the whole or any part of a sixteenth or thirty-sixth section has been disposed of, the State was to be compensated by other lands equal in quantity and as near as may be, in quality.

In *Bullock* v. *Rouse* (81 Cal., 590) the Supreme Court of that State, having under consideration the California school grant, quotes, with approval, at page 594, the following language from the decision in *Grogan* v. *Knight* (27 Cal.,522), viz:

> It has also been said by the Supreme Court of this State: "It may be admitted that by virtue of the act of Congress of 1853 the State became entitled to an amount of land equal to two sections in each Congressional township, yet as the State did not by virtue of that act, acquire the title to any specified tract of land, and could not acquire it until the survey had been made under the authority of Congress, it necessarily follows that prior to such survey she has no power or authority to confer upon a purchaser from her any right, title, or interest in any specified parcel of such lands." (*Grogan* v. *Knight*, 27 Cal., 522.)

Unless and until the Indian right of occupancy to the land involved has been extinguished, the right of the State of Wisconsin to the same is in suspension.

The bill practically admits that such right has not been extinguished (subdivisions 6 and 16, pages 7 and 21), but if no such admission was made, the court could take judicial notice of the fact that such right has not been extinguished, for the reason that the dealings of the Government with the Indian tribes form such an important phase of the political history of the country and its development that the courts will take judicial notice of those dealings as

shown by the acts of Congress, public documents, and proclamations of executive officers, and the records of the Interior Department. (*Knight* v. *U. S. Land Association*, 142 U. S., 161, 168, 169.)

It is submitted, however, that such right of occupancy in view of the provisions of article eleven of the treaty of 1854 could not be extinguished except by act of Congress, unless the acceptance of allotments and patents to the same works an extinguishment.

In the opinion rendered by Mr. Justice Baldwin, in *Cherokee Nation* v. *State of Georgia*, in 5 Peter,1, he states, among other things, at page 48:

> Indians have rights of occupancy to their lands as sacred as the fee simple absolute title of the whites; but they are only rights of occupancy, incapable of alienation, or being held by any other than common right without permission from the Government.

The above quotation was referred to and approved in the *United States* v. *Cook* (19 Wall., 591, 593), and in *Leavenworth, etc., Railroad Company* v. *United States* (92 U. S., at page 243), and also in *Beecher* v. *Wetherby* (95 U. S., at page 525). In the case of *Minnesota* v. *Hitchcock* (185 U. S., page 389), it is stated:

> The Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

In the case of *Gaines et al.* v. *Nicholson et al.* (9 Howard), the court uses the following language at pages 364 and 365:

> The State of Mississippi acquired a right to every sixteenth section by virtue of these acts, on the extinguishment of the Indian right of occupancy, the title to which, in respect to the particular sections, became vested, if vested at all, as soon as the surveys were made and the sections designated. No patent was necessary or is ever issued, for these school sections. And the question presented is whether the general right reserved to Wall under the treaty to select a section of land in the ceded territory operated to suspend the vesting of the title in the State till a selection could be made and patent issued under the direction of the President, or whether the selection in respect to these general floating rights that bind no particular parcel or section must be made in subordination to the right acquired by the State. * * * No previous grant of Congress could be paramount according to the right of occupancy which this Government has always conceded to the Indians within her jurisdiction.

In this connection the court further adds, "that an Indian holds, strictly speaking, not under the treaty of cession, but under his original title confirmed by the Government in the act agreeing to the reservation."

As to the nature and character of the Indian's title by occupancy, the court, in *United States* v. *Cook* (19 Wall. 591, 593, 594), says:

> This right of use and occupancy by the Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. * * * But a tenant for life has all the rights of occupancy in the lands of a remainder-man. The Indians have the same rights in the lands of their reservations. What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more.

It is elementary that a tenant for life under the common law was entitled to the undisturbed use and occupation of the lands of the remainder-man. Blackstone in this connection (Cooley's Edition, Book 2, p. 120) says, "For he hath a right to the full enjoyment and use of the land and all its profits during his estate therein."

In *Leavenworth, etc., R. R. Company* v. *United States* (92 U. S., 733), it was held (syllabus):

> The doctrine in *Wilcox* v. *Jackson* (13 Pet., 498) that a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands and that no subsequent law or proclamation will be construed to embrace it or to operate upon it, although no exception be made of it, reaffirmed and held to apply with more force to Indian than to

military reservations, inasmuch as the latter are the absolute property of the Government, whilst in the former other rights are vested.

Where the right of an Indian tribe to the possession and use of certain lands as long as it may choose to occupy the same is assured by treaty, a grant of them, absolutely or *cum onere*, by Congress to aid in building a railroad violates an express stipulation, and a grant in general terms of "land" can not be construed to embrace them.

At page 742 the court says, among other things:

As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it. * * *

As long ago as *The Cherokee Nation* v. *Georgia* (5 Pet., 1), this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy until it shall be extinguished by a voluntary cession to the Government; and recently, in *United States* v. *Cook* (19 Wall., 591), that right was declared to be as sacred as the title of the United States to the fee.

At page 747 the court says, among other things:

Every tract set apart for special uses is reserved to the Government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indian or for other purposes.

In *Beecher* v. *Wetherby* (95 U. S., 517), at page 525, the court, among other things, said:

> But the right which the Indians held was only that of occupancy. The fee was in the United States subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians. That occupancy could only be interfered with or determined by the United States.

In *Buttz* v. *Northern Pacific Railroad Company* (119 U. S., 55), it was held (syllabus):

> The grant by the act of Congress of July 2, 1864, to the Northern Pacific Railroad Company of lands to which the Indian title had not been extinguished operated to convey the fee to the company, subject to the right of occupancy by the Indians.
>
> The manner, time, and conditions of extinguishing such right of occupancy were exclusively matters for the consideration of the Government, and could not be interfered with nor put in contest by private parties.

In *Bardon* v. *Northern Pacific Railroad Company* (145 U. S., 535), the principles announced in the foregoing cases of *Wilcox* v. *Jackson, Leavenworth, etc., Railroad Company* v. *The United States*, and *Buttz* v. *The Northern Pacific Railroad Company* were referred to and approved.

In *United States* v. *Thomas* (151 U. S.), page 577, the court said, in regard to school grants, at page 583:

> The general rule established by the Land Department with reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize.

In the case of the *Missouri, Kansas and Texas Railroad Company* v. *Roberts* (152 U. S., 115), it appeared, among other things, that by the first article of the treaty of June 2, 1825 (7 Stats., 240), between the United States and the Osage tribe of Indians, the latter ceded to the former a large tract of land, part of which was afterwards included within the boundaries of the territory now the State of Kansas.

By the second article thereof a certain tract now within said State was "reserved to and for the Great and Little Osage tribes of Indians or nations aforesaid so long as they may choose to keep the same." Subsequent to the date of this treaty, and on May 30, 1854, an act was passed organizing the Territories of Nebraska and Kansas (10 Stats., 277), the thirty-fourth section providing for a grant of land to the Territory of Kansas for school purposes in the following words (289):

> *And be it further enacted*, That when the lands in the said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the

> same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purposes of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same.

January 29, 1861 (12 Stat., 126), Congress passed an act for the admission of Kansas into the Union under a constitution adopted by the people of the Territory of Kansas October 4, 1859. Section 1 of said act provided, among other things, in effect, that nothing in the constitution should be construed to impair the rights of person or property now pertaining to the Indians in the Territory of Kansas so long as such rights should remain unextinguished by treaty between the United States and the Indians. Section 3 provided in part—

> That sections numbered sixteen and thirty-six in every township of public lands in said State—and where either of said sections or any part thereof has been sold or otherwise been disposed of other lands equivalent thereto and as contiguous as may be—shall be granted to said State for the use of schools.

July 26, 1866 (14 Stat., 289), Congress made a grant of lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway, etc. February 3, 1870, the name of said company was changed to that of the Missouri, Kansas and Texas Railway Company.

Section 2 of said act provided as follows:

> That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That actual bona fide settlers under the preemption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided also*, That settlers under provisions of the homestead act, who make their settlement after the passage of this act and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

By the treaty of September 29, 1865 (14 Stat., 687), between the United States and the Great and Little Osage Indians, which was subsequently amended by the Senate and signed by the President January 21, 1867, the said Osage tribe of Indians ceded a part of their lands in Kansas to the United States. As amended the first article of the treaty provided that the lands so ceded—

> shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, including any act granting lands to the State of

> Kansas in aid of the construction of a railroad through said lands, but no preemption claim or homestead settlement shall be recognized.

Subsequently a question arose between the Missouri, Kansas and Texas Railway Company and Roberts involving the right of possession of lands within section 16, in township 34, Labette County, Kans., to which the railway company claimed title under the aforesaid act of July 26, 1866, while Roberts claimed title through the State of Kansas. In referring to the treaty with the Osage Indians it is stated in 152 U. S., 118:

> And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands, and consequently of the lands from sale and preemption.

And again, on page 119, the court in speaking of the school grant contained in section 34 of the act of May 30, 1854, among other things, says:

> It could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians.

Defendant concedes that even though the lands in controversy had not been surveyed when Wisconsin was admitted into the Union Congress could have, by the school grant, provided for the extinguishment of the Indian right of occupancy, but he submits that Congress did not so provide, for the reason that there are no express terms in the grant to that effect.

To support this proposition reference is had to the case last cited, page 118, where the court in effect holds that where a right of occupancy to certain lands is reserved to an Indian tribe that this right can not be disturbed by those claiming under a subsequent grant or statute unless such grant or statute in express terms indicates an intention on the part of Congress to change the possession of the lands so reserved. At page 119 it is further stated:

As early as 1839 it was held, in *Wilcox* v. *Jackson* (13 Pet., 498):

> That a tract lawfully appropriated to any purpose becomes thereafter severed from the mass of public lands, and that no subsequent law or proclamation will be construed to embrace or operate upon it, although no exception be made of it.

The reservation referred to there was of land for military purposes, and in *Leavenworth, etc., R. R. Co.* v. *United States* (92 U. S., 733), page 745, it was said that this doctrine—

> applies with more force to Indian than to military reservations. The latter are the absolute property of the Government; in the former, other rights are vested. Congress can not be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose.

As to the effect of the act for the admission of Kansas the court observed at page 120 (152 U. S.):

> The Indians continued thereafter, as previously, in possession of the lands, and their rights, whatever their nature and extent, were not extinguished by anything in the act of admission of the State into the Union nor at the time of the grant of a right of way by the act of July 26, 1866.

In *Spalding* v. *Chandler* (160 U. S., 394) it is stated at pages 402, 403:

> It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this Government vested in the United States. The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land, with the privilege of using it in such mode as they saw fit until such right of occupation had been surrendered to the Government. When Indian reservations were created, either by treaty or Executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.

In *Minnesota* v. *Hitchcock* (185 U. S., 373) the court uses the following language at pages 388, 389:

> Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant con-

> tends, or unconceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional) the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon.

In *Scott* v. *Carew* (196 U. S., 100), at page 109, the court said, among other things:

> Where particular tracts have been taken possession of by rightful orders of an Executive Department, to be used for some public purpose, Congress in legislating will be presumed to have intended no interference with such possession nor a sale or disposal of the property to private individuals. Such has been the rule obtaining in the land department, as well as in the courts.

At page 111 it was stated:

> Many authorities might be cited to the proposition that a prior appropriation is always understood to except lands from the scope of a subsequent grant, although no reference is made in the latter to the former.

In the case of Henry Sherry (12 L. D., 176) Assistant Attorney-General Shields, in an opinion to the Secretary of the Interior, held (syllabus) that—

> The fee to the school sections within the Menomonee Indian Reservation passed by the school grant to the State, subject, however, to the Indian right of occupancy, which yet exists, and neither the State nor its assignee can in any way interfere with the full enjoyment of said right.

In the case of the *State of Wisconsin* (19 L. D., 518) it was held (syllabus):

> By the swamp-land grant the State of Wisconsin acquired the title, the naked fee, to the swamp land embraced within the Lac de Flambeau Reservation, subject to the right of Indian occupancy, and while said right exists no action should be taken under said grant looking toward a disturbance of the Indian right.

Assistant Attorney-General Van Devanter, in an opinion rendered to the Secretary of the Interior November 27, 1901 (see Appendix), among other things says, in respect to sections 16 in the La Pointe Indian Reservation:

> The Indian right of occupancy to the sections in question existing at the time of the grant to the State has never been extinguished; and even if the view most favorable to the State be taken it still follows, from what is said in *Beecher* v. *Wetherby* and in other cases, that until the extinguishment of the Indian title the State and its grantees have only the

> naked fee, the right of occupancy being in the Indians, and there is no power or right in the State or its grantees to interfere with or terminate this right of occupancy. That can be done only by the United States, and then only by or in pursuance of some act of Congress. The cutting and removal of the timber from the sections in question at this time would be an unauthorized invasion of the right of occupancy of the Indians, unless done under a law of Congress.

The case of *Beecher* v. *Wetherby* (supra) lends no support to the contention of the State in this case. The land there involved is in Wisconsin and was identified by survey in May or June in 1854, while the Indian treaty which embraced it in an Indian reservation did not take effect until in August, 1854, and the act of Congress under which it was attempted to sell the land for the benefit of the Indian was not enacted until 1871, all of which appears in the opinion of the court. The land, therefore, had been identified by survey before its attempted reservation by the treaty in question there. It further appears in the opinion of the court (see p. 527) that the Indians "had removed from the land in controversy and other sections had been set aside for their occupation."

In commenting upon the case of *Beecher* v. *Wetherby*, the court, in *Minnesota* v. *Hitchcock* (185 U. S., 397, 398), among other things, says:

> The court held that the title of the defendant under the school grant was superior to that of the plaintiff under the sale by the United

States. Two facts are apparent: First, the Menomonee Indians in the first instance received a cash and real estate consideration for the large reservation which they conveyed to the United States; second, that while thereafter a tract was ceded to them to be held as Indian lands are held—a tract which included the section in controversy—and while by an earlier treaty with the Menomonees two townships of such tract (including this particular section 16) had been set apart for the use and benefit of the Stockbridge and Munsee Indians, yet there appears no treaty or agreement with either the Menomonee of Stockbridge or Munsee Indians in reference to the sale of these two townships. Yet, as stated by the court, "when the logs in suit were cut, those tribes had removed from the land in controversy and other sections had been set apart for their occupation." The ruling was that the United States held the fee, subject only to the Indian right of occupancy; that by the school-land section in the enabling act there was a grant, or promise to grant, in either event to be taken as an appropriation of the fee to the State, subject to the Indian right of occupancy; that the Indians had removed from the lands and had received other lands for their occupation; that hence all Indian rights had ceased.

If the school grant to the State of Wisconsin contemplated the tracts in controversy, the State may elect to take equivalent tracts of land, or it may await the extinguishment of the Indian right of occupancy, and then take said tracts. But the Government is not obligated to extinguish the right of occupancy by the Indians.

In the *State of Colorado* (6 L. D., 412), Secretary Lamar, at page 418, says:

> I think, however, the true theory of the school grant is this: That where the fee is in the United States at the date of the survey, and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the title and right of possession unite in the Government land then satisfy its grant by taking the lands specifically granted.

In the *United States* v. *Thomas* (151 U. S., 577, 583) and in *Minnesota* v. *Hitchcock* (185 U. S., 373, 393) the above language of Secretary Lamar was quoted and approved. It was also quoted and approved by Secretary Noble in the case of the *State of Colorado* (12 L. D., 70, 71).

In *Minnesota* v. *Hitchcock* (185 U. S., 373) the court said, at pages 393, 394:

> But while this is true, it is also true that Congress does not, by the section making the school land grant, either in letter or spirit, bind itself to remove all burdens which may rest upon lands belonging to the Government within the State, or to transform all from their existing status to that of public lands, strictly so called, in order that the school grant may operate upon the sections named. It is, of course, to be presumed that Congress will act in good faith; that it will not attempt to impair the scope of the school grant; that it intends

> that the State shall receive the particular sections or their equivalent in aid of its public school system. But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the school grant, and the State must seek relief in the clause which gives it equivalent sections.

So far as the Indians' right of occupancy to the tracts in controversy within the Flambeau Reservation is concerned, it matters not that neither its boundaries or descriptions "were fixed or determined by the United States until after the lands embraced within said reservation had been surveyed and subdivided into sections," as alleged in Subdivision XIII of the amended bill, page 19. The logical inference to be drawn from the bill, taken as a whole, is, and such is the fact, that long previous to the time of the admission of Wisconsin into the Union and thereafter, to and including the date of the survey and up to the time the boundaries of the said reservation were fixed permanently by the Secretary of the Interior in 1866, the Wisconsin band of Indians, with the consent of the Government used and occupied all of the lands now known as the Flambeau Indian Reservation.

In *Minnesota* v. *Hitchcock* (supra), at page 390, it was stated:

> In order to create a reservation it is not necessary that there should be a formal session or a formal act setting apart a particular tract.

> It is enough that from what has been done there results a certain defined tract appropriated to certain purposes.

In *Spalding* v. *Chandler* (160 U. S., 394) there was presented a question of the origin of an Indian reservation, and in passing upon this question the court at pages 403, 404, says:

> It is not necessary to determine how the reservation of the particular tract subsequently known as the "Indian reserve" came to be made. It is clearly inferable from the evidence contained in the record that at the time of the making of the treaty of June 16, 1820, the Chippewa tribe of Indians were in the actual occupation and use of this Indian reserve as an encampment for the pursuit of fishing. * * *
>
> But whether the Indians simply continued to encamp where they had been accustomed to prior to the making of the treaty of 1820, whether a selection of the tract afterwards known as the Indian reserve was made by the Indians subsequent to the making of the treaty and acquiesced in by the United States Government, or whether the selection was made by the Government and acquiesced in by the Indians, is immaterial. * * *
>
> If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general

or limited uses and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

DEFENDANT'S SECOND PROPOSITION.

That the lands embraced in the sections 16 in controversy which fall within the La Pointe Reservation are subject to allotments in severalty to such members of he La Pointe band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and under the provisions of the said acts of February 8, 1887, and of February 11, 1901, provided there are not sufficient other lands for such purpose within said reservation. And that the lands embraced in the sections 16 in controversy which fall within the Flambeau Reservation are subject to allotments in severalty to such members of the Wisconsin band of the Chippewa tribe of Indians as are entitled to allotments under the stipulations contained in article 3 of the said treaty of 1854, and the provisions of the said act of February 8, 1887, provided there are not sufficient other lands for such purpose within the Lac Du Flambeau and Lac Court Orielles reservations.

Article 3 of the treaty of 1854 stipulated, among other things, that—

> The United States will define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may from time to time, at his discretion, cause the whole to be surveyed and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs,

> issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose.

Can there be any doubt how the Indians understood the language of the above stipulations? Can anyone understand it in a sense other than that *all* the lands embraced within said reservations were subject to allotments in severalty to the members of the respective bands occupying the same?

These stipulations were agreed to by the Government before the tracts in controversy were surveyed. Hence Congress had absolute power to set them apart to be allotted to the Indians, notwithstanding the provisions of the Wisconsin school land grant. As was said by the court in *Heydenfeldt* v. *Daney Gold, etc., Co.* (93 U. S., 634, 640):

> Until the *status* of the lands was fixed by a survey and they were capable of identification, Congress reserved absolute power over them, and if in exercising it the whole or any part of a sixteenth or thirty-sixth section has been disposed of, the State was to be compensated by other lands as near as may be in quality.

And in *Minnesota* v. *Hitchcock* (supra), pages 393, 394, it is stated:

> But considerations may arise which will justify an appropriation of a body of lands within the State to other purposes, and if those lands have never become public lands the power of Congress to deal with them is not restricted by the State grant.

In regard to the question whether the agreement with the Indians in 1854 was a disposal of the tracts in controversy if needed to provide allotments for the Indians, the court, in *Leavenworth, etc., R. R. Co.* v. *U. S.* (733, 747), says:

> Every tract set apart for special uses is reserved to the Government to enable it to enforce them. There is no difference in this respect whether it be appropriated for Indian or for other purposes.

Whether, after said tracts were surveyed, Congress could (as it would seem it has attempted), by the act of February 11, 1901 (31 Stats., 766), enlarge the scope of said article 3 by providing for more allotments than were contemplated by it if such enlargement would work to the prejudice of the rights of the State by virtue of its school grant, is not a pertinent question in this case, in view of the following allegation in said subdivision 16, page 21 of the bill, which says:

> That the lands within said reservations, exclusive of the lands in sections sixteen, are sufficient to secure eighty acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of any land embraced within any of said sections sixteen.

DEFENDANT'S THIRD PROPOSITION.

The question in regard to what Indians are entitled to allotments of land within said reservations, is administrative or political in its nature, hence to be determined by the Indian Bureau, acting under the direction and supervision of the Secretary of the Interior, and its action in the premises can not be controlled or interfered with by the courts either by injunction or mandamus proceedings. Not until the Indian Bureau has finally acted in any matter may the courts review its action and correct the same if wrong.

That the Indian Bureau of which the Secretary of the Interior is the head, is the tribunal upon which the law has imposed the duty of making allotments of lands to Indians is unquestioned. And it is eqally true that the performance of such duty requires the exercise of judgment and discretion; the ascertainment of facts and the construction of treaties and laws.

In the case of *Gaines* v. *Thompson* (7 Wall., 347, 352, 353), the court, through Mr. Justice Miller, speaking of the right of the judiciary to interfere with the action of an officer of the Executive Department while in discharge of a duty imposed upon him by law, says:

> An officer to whom public duties are confided by law is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions. Certain powers and duties are confided to those officers and to them alone, and however the courts may, in ascertaining the rights of parties in suits properly before them pass upon the legality of their acts, after

> the matter has once passed beyond their control, there exists no power in the courts, by any of its processes, to act upon the officer so as to interfere with the exercise of that judgment while the matter is properly before him for action. The reason for this is that the law reposes this discretion in him for that occasion, and not in the courts. This doctrine therefore is as applicable to the writ of injunction as it is to the writ of mandamus.
>
> In the one case the officer is required to abandon his right to exercise his personal judgment and to substitute that of the court by performing the act as it commands. In the other he is forbidden to do the act which his judgment and discretion tell him should be done. There can be no difference in the principle which forbids interference with the duties of these officers, whether it be by writ of mandamus or injunction.

In the case of *New Orleans* v. *Paine* (147 U. S., 261, 267) the doctrine above announced was approved.

In *Brown* v. *Hitchcock* (173 U. S., 473, 477) the court says:

> As a general rule no mere matter of administration in the various Executive Departments of the Government can, pending such administration, be taken away from such departments and carried into the courts; those departments must be permitted to proceed to the final accomplishment of all matters pending before them, and only after that disposition may the courts be invoked to inquire whether the outcome is in accord with the laws of the United States.

DEFENDANT'S FOURTH PROPOSITION.

That until the Indian right of occupancy has been extinguished, either by act of Congress or by the acceptance by all of the Indians on said reservations of allotments and patents therefor, he, as Secretary of the Interior, is clothed with the power and it is his duty to prevent any person or persons from interfering with the possession, use, and enjoyment by the Indians, or any of them, of all or any part of said reservations, including the lands within the sections 16 in controversy.

The above proposition is based upon sections 441 and 463 of the Revised Statutes, also upon sections 2147 to 2150, inclusive, and is supported by the decisions of this and other tribunals.

By section 441 the Secretary of the Interior is charged with the superintendence of public business relating to the Indians. Section 463 provides that he shall "have the management of all Indian affairs and of all matters arising out of Indian relations."

In respect to the force and effect of sections 2147–2150, inclusive, the Attorney-General, in an opinion given to the Secretary of the Interior September 7, 1900, relating to trespassers upon Indian lands (23 Ops. Atty.-Gen., 214) held (syllabus):

> Sections 2146 to 2150, inclusive, of the Revised Statutes expressly confer the right to use the military forces of the United States in ejecting trespassers upon Indian lands and the grant of this power carries with it the duty of its exercise.

The above was quoted with approval by this court in *Morris* v. *Hitchcock* (194 U. S., 384, 392). See also

United States v. *Rickert* (188 U. S., 432, 439); *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 307, 308); *United States* v. *Thomas* (151 U. S., 577, 582, 583); *Beecher* v. *Wetherby* (95 U. S., 517, 525); *United States* v. *Mullin* (71 Fed. Rep., 682, 685, 686); *United States* v. *Flournoy Live Stock Co.* (69 ib., 886, 892); *Pilgrim* v. *Beck* (ib., 895, 896, 897); *Beck* v. *Flournoy Real Estate Co.* (65 ib., 30, 35, 37); *Eells* v. *Ross* (64 ib., 417, 426); *Hitchcock* v. *United States ex rel. Bigboy* (22 Appeal Cases, D. C., 275, 284, 287, 288).

In view of the fact, of which the court will take judicial notice and which is inferentially admitted in Subdivision XVI, page 20, of the second amended bill, to the effect that only a part of the Indians on said reservations have received allotments of lands therein, and that only such Indians have ceased to occupy, in common with the others, the tracts in question, it is not necessary to inquire whether, under the doctrine announced in the recent case of *Matter of Heff* (197 U. S., 488), an Indian who accepts an allotment and patent therefor thereby terminates his tribal relations and extinguishes his right to occupy the remaining part of the reservation in common with those Indians who have not received allotments. The question here presented is whether the defendant, as Secretary of the Interior, notwithstanding allotments have been made and patents therefor issued to some of the Indians, still retains jurisdiction and control of the unallotted parts of the reservations, and the authority to prevent intrusion thereon by the State of Wisconsin or its grantees.

The defendant submits, in view of the authorities heretofore under this proposition cited and referred to, that until all the Indians entitled thereto have received allotments he has jurisdiction and control over the unallotted parts of the reservations to the same extent as he had over the whole of said reservations prior to any allotment.

DEFENDANT'S FIFTH PROPOSITION.

Even though the right of occupancy in the Indians were extinguished, so far as concerns the La Pointe Reservation, the State of Wisconsin has no such interest in any of the lands therein as entitles her to bring an action in any court.

This proposition is based upon the following allegation in Subdivision XVI, page 20, of the second amended bill:

> That patents for all of said sections 16 within said La Pointe Reservation have heretofore been issued by said State to various parties.

CONCLUSION.

Independently of any other authorities the defendant submits that his contention is sustained by the decision of this court in *United States* v. *Thomas* (151 U. S., 577), and to allow the claim of the State it is necessary to overrule the doctrine set forth therein.

In that case there was involved a section 16 within the Lac Court Orielles Reservation in the State of Wisconsin contemplated by the third paragraph of article 2 of the said treaty of 1854 (second amended bill, p. 11). The survey was made in 1855, and the

lands within the reservation selected in 1859. In 1865 the State sold the section and the purchaser denuded it of its timber. The Indians occupied the section to hunt and fish thereon before and after the cutting of the timber (151 U. S., 578). Sometime previous to 1893, one Thomas, a member of the Chippewa tribe of Indians, was indicted in the United States Circuit Court for the Western District of Wisconsin for the killing of a half-breed Indian on said section 16, the proceedings being conducted under the provisions of section 9 of the act of March 3, 1885 (23 Stats., 362, 385). A motion was made by defendant Thomas, to set aside the verdict and for a new trial, which motion was based upon the provisions of section 7 of the Wisconsin enabling act, *supra*. The defendant insisted that the section of land upon which the killing was done was "ceded to the State for school purposes, and could not, therefore, be subsequently taken by the United States and set apart as part of an Indian reservation." (*Ib.*, 578.)

The case came to this court on a certificate of division of opinion between the circuit judge and the district judge. This court held (page 586) "That the offense committed was within the limits of the reservation within the meaning of the act of Congress approved March 3, 1885, so as to give the Federal courts jurisdiction of the same," and returned the case to the court below with directions to deny the motion.

In the course of the opinion the court, through Mr. Justice Field, said, among other things, at page 582:

The Indians have never been removed from the lands thus ceded (meaning by the treaty of 1842) and no Executive order has ever been made for their removal and no change has taken place in their occupancy of the lands except as provided by the treaty of September 30, 1854 (10 Stat., 1109). By that treaty the Chippewas ceded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Orielles Reservation. In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandered lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations.

As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the enabling act, the Indians stipulated for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the land until they were required to surrender it

by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized. The general rule established by the Land Department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize.

At pages 584 and 585 the court said:

We therefore are of the opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the State may claim ultimately n the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it

in force. The State of Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States, with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy, as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians.

It is respectfully submitted that the demurrer of the defendant should be sustained.

FRANK L. CAMPBELL,
Assistant Attorney-General.
A. C. CAMPBELL,
Special Assistant to the Attorney-General.

APPENDIX.

OPINION OF ASSISTANT ATTORNEY-GENERAL VAN DEVANTER.

DEPARTMENT OF THE INTERIOR,
Washington, November 27, 1901.

The SECRETARY OF THE INTERIOR.

SIR: Under your informal reference I have considered the letter of the 12th instant, written by the Clifford & Fox Lumber Company and J. S. Stearns Lumber Company to the Commissioner of Indian Affairs, wherein it is stated that said companies are the owners, by reason of conveyances from the State of Wisconsin, of three sections numbered 16 in the La Pointe or Bad River Indian Reservation in said State; that these sections are timbered; that there is danger of the timber being destroyed by fire, and that said companies therefore desire immediate permission to cut and remove such timber.

The State of Wisconsin was admitted into the Union May 28, 1848 (9 Stat., 233), and by section 7 of the enabling act of August 6, 1846 (9 Stat., 56), was granted, for the use of schools, sections 16 in every township, where not sold or otherwise disposed of, and where sold or otherwise disposed of, was given the right to take other lands equivalent thereto. At the time of the admission of the State, and until after the establishment of the La Pointe or Bad River Indian Reservation, the lands in question remained unsurveyed. This reservation was established under the second subdivision of article 2 of the treaty

of September 30, 1854 (10 Stat., 1109), and its boundaries were definitely fixed by the President's order of March 7, 1855. The reservation has not been extinguished. Before the negotiation of the treaty or the establishment of the reservation the lands embraced therein were claimed and held by the Indians under their original right of occupancy. By the treaty the Indians relinquished their claim of occupancy to other lands, and in consideration thereof the Government, among other things, agreed to set apart and maintain this reservation.

Whether the status of the lands embraced in sections 16 at the time of their identification by survey or their status at the time of the grant to the State is the criterion by which to determine whether they passed to the State under the school-land grant, or had been sold or otherwise disposed of and were therefore only a basis for the selection by the State of other equivalent lands as indemnity, is an interesting question, which is not free from doubt. (See *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U. S., 634; *Beecher* v. *Wetherby*, 95 U. S., 517; *State of Colorado*, 6 L. D., 412; *State of Minnesota*, 28 L. D., 374, 379.) But however that may be, the Indian right of occupancy to the sections in question existing at the time of the grant to the State has never been extinguished, and even if the view most favorable to the State be taken, it still follows from what is said in *Beecher* v. *Wetherby* and in other cases that until the extinguishment of the Indian title the State and its grantees have only the naked fee, the right of occupancy being in the Indians, and there is no power or right in the State or its grantees to interfere with or terminate this right of occupancy. That can be done only by the United States, and then only by or in pursuance of some act of Congress.

The cutting and removal of the timber from the sections in question at this time would be an unauthorized invasion of the right of occupancy of the Indians, unless done under a law of Congress. The timber upon these sections is admitted to be green and growing. The act of February 16, 1889 (25 Stat., 673), authorizes the cutting, removal, and sale of dead timber, standing or fallen, on such reservations, and there is no statute applicable to green and growing timber. This Department and the President have taken the view that article 3 of the treaty of 1854 authorizes the President to permit the cutting, removal, and sale of all the timber upon the lands in said reservation allotted in severalty to Indians under that article, but the sections here in question have not been allotted, and therefore do not come within the view so taken.

The letter of said lumber companies calls attention to that portion of article 3 of the treaty which declares that the President "may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights." The La Pointe Reservation was, at the time of the treaty, in a very remote and unsettled part of the State, but other reservations established by the treaty were in the vicinity of or adjoining white settlements and lands held in private ownership. This may account for the use of the provision to which attention is called, but in any event its extent and purpose are not readily apprehended, and I do not understand that a change in the boundaries of the reservation, or any similar action, will accomplish the purpose of the lumber companies.

The sections 16 in question are not upon or near a boundary of the reservation, but are in the interior

thereof. Again, this reservation has stood unchallenged for over forty years, and the adjoining public lands have been so far disposed of at this time and the opportunity to get lands equivalent in character or value to the sections in question has become so restricted, that it is doubtful whether it would now be practicable to assign to the Indians any other lands in the vicinity of the reservation in lieu of sections 16, even if such a course were considered originally permissible under the treaty.

I am of opinion that further legislation by Congress is necessary to any present adjustment of the situation presented by the letter of these two companies.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney-General.

Approved, November 27, 1901.

E. A. HITCHCOCK,
Secretary.

O

Supreme Court of the United States.

No. 12, Original.—October Term, 1905.

The State of Wisconsin, Complainant,
vs.
Ethan Allen Hitchcock, Secretary of the Interior. } In Equity.

[April 2d 1906.]

Mr. Justice Harlan delivered the opinion of the Court.

The State of Wisconsin seeks by this suit to enjoin the defendant as Secretary of the Interior from interfering, in anywise, with its use, possession or enjoyment of certain lands, embraced within the present La Pointe or Bad River and the Flambeau Indian Reservations in that State.

The State traces its title back to the act of Congress of August 6th 1846, authorizing the people of Wisconsin Territory to form a State constitution and providing for the admission of such State into the Union. 9 *Stat.* 56, c. 89.

The defendant Hitchcock, as Secretary of the Interior, demurred to the bill upon the ground, among others, that it did not appear that the State was entitled to the relief asked.

The general question is whether the State has such interest, present or prospective, in the lands in dispute as to preclude their being administered by the Secretary of the Interior for the benefit of certain Indians.

The case, as presented by the record and by official documents of which judicial notice may be taken, is as follows:

On the 28th day of March 1843, by a treaty between the United States and the Chippewa Indians of "the Mississippi and Lake Superior," the latter ceded to the United States all the country embraced within a specified boundary, including the lands here in controversy. The second and third articles of that treaty provided: "Art. 2. The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges *of occupancy, until required to remove by the President of the United States*, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress. Art. 3. It is agreed by the parties to this treaty that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands shall be the common property and home of all the Indian party to this treaty." In consideration of the above

cession the United States (Art. 4.) engaged to pay the Indians annually for twenty-five years certain sums; and this consideration for the ceded lands was paid by the United States. *Revision of Indian Treaties*, 217.

By an act of Congress approved August 6th 1846, the people of the then Territory of Wisconsin were authorized to form a Constitution and State Government for the purpose of being admitted into the Union on an equal footing with the original States in all respects whatsoever, with certain specified boundaries. The seventh section of that act was as follows: "That the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin, for acceptance or rejection; and if accepted by said convention, and ratified by an article in said constitution, they shall be obligatory on the United States: 'First. That section numbered sixteen, in every township of the public lands in said State, and, where such section has been sold or otherwise disposed of, other lands equivalent thereto, and as contiguous as may be, shall be granted to said State for the use of schools. . .'" 9 *Stat.* 57.

The conditions prescribed by the enabling act of 1846 were duly accepted by Wisconsin, and that Territory was admitted into the Union as a State by an act of Congress approved May 29th 1848. 2 *Charters and Constitutions*, 2029; 9 *Stat.* 233.

By a treaty made and concluded September 30th 1854 between the United States and the Chippewa Indians of Lake Superior and the Mississippi, and which treaty was proclaimed January 29th 1855, (10 *Stat.* 1109,) the Chippewas of Lake Superior ceded to the United States the lands theretofore owned by them in common with the Chippewas of the Mississippi within the present boundary of Minnesota and lying east of a certain boundary. The Chippewas of the Mississippi assented to that cession and agreed that the whole amount of the consideration money for the country ceded as above should be paid to the Chippewas of Lake Superior, the latter relinquishing to the Chippewas of the Mississippi all their interest in and claims to the lands theretofore owned by them in common, lying west of the above boundary line.

The lands described in the first article of the treaty of 1854 are within the present State of Minnesota and constitute no part of the land embraced in the treaty of 1843.

By the second article of that treaty the United States agreed, among other things, to set apart and withhold from sale certain lands for the use of the La Pointe band and such other Indians as might settle with them. For the other Wisconsin bands, a tract of land was to be set apart and withheld from sale, "lying about Lac de Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries

of which shall be hereafter agreed upon or fixed under the direction of the President." The lands described in that article of the treaty of 1854 to be set apart and withheld from sale "for the La Pointe band" and "for the other Wisconsin bands" *were part of the lands ceded to the United States by the treaty of* 1843.

The third article of the treaty was in these words: "Article 3. The United States will define the boundaries of these reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patent therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or a single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The bill alleges: "That under the enabling act of Congress aforesaid and under the State constitution and under and in view of the cession of their lands by said Chippewa Indians, contained in said treaty of 1843, all of the lands surveyed and to be surveyed as sections 16 of the various townships within the territory covered by said treaty vested in the State of Wisconsin, and said State of Wisconsin has at all times heretofore, since its admission to the Union, claimed a right to the fee of all lands in sections 16 in the several townships within said reservations, and, since the sectional survey thereof by the United States, has claimed the actual fee in said sections and has exercised dominion and ownership over the same and has issued sundry and divers patents to divers persons and corporations for portions thereof, sundry of which persons and corporations, grantees of the State as aforesaid, have also exercised acts of ownership thereof, and have paid taxes and made improvements thereon, and have cut and hauled timber therefrom until forbidden by orders of the defendant, Ethan Allen Hitchcock, as Secretary of the Interior of the United States, as hereinafter more particularly mentioned; that patents for all of said sections 16 within said La Pointe Reservation have hereto-

fore been issued by said State to divers parties, and patents upon about fourteen forties of said sections 16 within said Lac Du Flambeau Reservation have been issued by said State to divers parties, and there still remain about twenty-nine forties in said sections 16 within said Lac Du Flambeau Reservation, the title to which is still in and claimed by said State. That under the treaty of 1854 aforesaid and in carrying out its provisions the said Secretary of the Interior has proceeded, through the United States Indian Department, to allot from time to time to the various members of said tribes of La Pointe bands of Indians and to various members of the Wisconsin bands on said Lac Du Flambeau Reservation eighty acres per capita of lands within said reservations and has caused patents therefor to be issued to the members of said tribes as individuals, and such members have become full citizens of the United States, and have terminated their tribal relations, and have ceased to occupy any material part of said reservation in common. That the lands within said reservation, exclusive of the lands in section 16, are sufficient to secure eighty acres to each individual Indian who has hitherto appeared and claimed a right to an allotment. That no allotment has hitherto been allowed to any member of said tribes of Indians of any land embraced within any of said sections 16. That beginning about the year 1899, and from thence hitherto, the defendant, Ethan Allen Hitchcock, as Secretary of the Interior, and the Commissioner of the Indian Office of the United States, and divers agents and servants under them, have set up on behalf of said La Pointe and other bands of Indians, or the members thereof, a claim of interest or title in and to sections 16 aforesaid in the reservation townships aforesaid, paramount and adverse to the title of the State of Wisconsin, and have claimed and continue to claim that said sections 16 are still held by the United States in trust for said Indians to the same extent as other lands in said reserved townships, and have forbidden purchasers of such lands holding patents from the State to enter or make improvements or cut any timber thereon, and have thereby cast a cloud upon the title of the State and its grantees to said lands, and have interfered with, and are continuing to interfere with the use and enjoyment of the same by the owners thereof. . . That by Chap. 95 of the Laws of the State of Wisconsin for the year 1903, approved April 20th 1903, the Attorney General of the State of Wisconsin was duly authorized to institute proceedings in this court under the provisions of the act of Congress passed March 2d 1901, and hereinbefore referred to, to determine the rights of said State to what are commonly known as school lands, within any reservation or Indian cession within said State, where any Indian tribe claims any right to or interest in said lands, or to the disposition thereof by the United States, and particularly to determine the title of the lands embraced within sections 16 in the several

townships constituting the present Bad River or La Pointe and the Flambeau Indian Reservations within said State."

The State contends that the effect of the treaty of 1843 was that the Chippewa Indians released to the United States all of their claim of title or interest in or to the lands therein described and each and every part thereof, and ceded the same to the United States, which thereupon became the absolute owner thereof free from any claim of said Indians; and that the State, upon its acceptance of the conditions prescribed by the enabling act of 1846, and its admission into the Union, became vested with an absolute right in and to all the sections 16 within said territory previously surveyed, as well as to the lands subsequently surveyed by the United States, with the right in the State to have the temporary possession or occupancy of the Indians terminated by the United States.

The determination of the question suggested by this contention and the decision of this case is controlled by *United States* v. *Thomas*, 151 *U. S.* 577. That case involved the rights of the State of Wisconsin in and over certain lands in the La Court Oreilles Reservation, as established for the benefit of the Chippewa Indians. Thomas, an Indian of the Chippewa tribe, was indicted for the murder of another Indian of the same tribe committed within the limits of that reservation. The evidence showed that the offense was committed upon section 16 in a township embraced in the reservation. The accused contended that by the provisions of the enabling act by which Wisconsin was admitted into the Union, section 16 in every township in that State was ceded to it for school purposes, and could not be subsequently taken by the United States as part of an Indian reservation. It appeared that previous to the alleged murder, namely in 1859, the section upon which the crime was committed, had been settled, platted and set apart by the United States as a part and parcel of said reservation and was continuously thereafter occupied by the Indians as such, although claimed and sold by the State as and for a part of the school land ceded to it by the act of Congress. By act of Congress, approved March 3d 1885, *c.* 341, 23 *Stat.* 362, 385, it was provided that Indians committing certain crimes, among them murder, "against the person or property of another Indian within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." So the question was distinctly presented as to the relative rights of the State and the Indians in said section 16 within the Indian reservation on which the alleged murder was committed.

This court said: "The Indians have never been removed from the lands thus ceded (meaning by the treaty of 1842) and no Executive order has

ever been made for their removal and no change has taken place in their occupancy of the lands except as provided by the treaty of September 30, 1854 (10 *Stat.* 1109.) By that treaty the Chippewas ceeded a large portion of their territory, previously retained in Wisconsin and elsewhere, and provision was made in consideration thereof for the formation of permanent reservations for their benefit, each to embrace three full townships and their boundaries to be established under the direction of the President. One of these included the tract comprised in the La Court Orielles Reservation. In the provision for these reservations nothing was said of the sixteenth section of any townships, and it is clear that it was not contemplated that any section should be left out of any one of them. The land reserved was to be, as near as possible, in a compact form, except so far as the meandering lakes were concerned. When the townships composing these reservations were surveyed, the sixteenth section was already disposed of in the sense of the enabling act of 1846. It had been included within the limits of the reservations. As it will be seen by the treaty of 1842, ratified in 1843, which was previous to the enabling act, the Indians stipulated for the right of occupancy to the lands. That right of occupancy gave them the enjoyment of the lands until they were required to surrender it by the President of the United States, which requirement was never made. Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated. The general rule established by the Land Department in reference to the school lands in the different States is that the title to them vests in the several States in which the land is situated, subject to any prior right of occupation by the Indians or others which the Government had stipulated to recognize."

Again: "We therefore are of the opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right which the State may claim ultimately in the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854. That treaty provided for the permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but by including it in the new reservation, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The State of Winconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States, with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original right of occupancy,

as well as by the fact that the section is included within the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupation of the Indians." *United States* v. *Thomas*, 151 *U. S.* 577, 582, 584.

It is true that the *Thomas* case did not have reference to the particular Indian reservations involved in the present suit—the Bad River or La Pointe and Flambeau Reservations—but only to the La Courte Orielles Indian Reservation. But all three reservations had their origin alike in the same treaties—that of 1842, proclaimed in 1843, and that of 1854; and the effect of those treaties was considered in that case in connection with the enabling act of 1846 under which the State now claims, as it claimed in that case, absolute title to and full control over all the sections 16 named in that act. What the court said in the Thomas case, as to the rights of Indians in virtue of their occupancy of the lands set apart for their use in the La Courte Orielles Reservation, is strictly applicable to the rights of the Indians who have occupied, and, so far as appears, still occupy, the Bad River or La Pointe and Flambeau Reservations. We could not sustain the claim of the State in the present suit without overruling the principles announced in the Thomas case; and that we are not disposed to do. The principles of the Thomas case were recognized and enforced in *Minnesota* v. *Hitchcock*, 185 *U. S.* 373, 391, *et seq.*, which related to an act of Congress for the admission of Minnesota into the Union, and which act contained a provision similar to the one found in the enabling act for Wisconsin, namely, that certain sections "in every township of public lands in said State, and where either of said sections or any part thereof has been sold or otherwise disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools."

Without repeating all that was said in previous decisions, we hold, on the authority of those decisions, that the State is not entitled to the relief asked nor to any order that would interfere, at this time, with the administration by the Interior Department, of the lands in question for the benefit of the Indians for whom the Bad River or La Pointe Reservation and the Flambeau Reservations were established. Consequently, the bill must be dismissed.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.